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No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY,
Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, THE STATE OF NEW HAMPSHIRE, NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, THE COMMONWEALTH OF MASSACHUSETTS, AND THE STATE OF RHODE ISLAND,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Invoking for the first time a 1913 state statute, the New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling outside the state any energy generated by NEP's federally-licensed hydroelectric projects in New Hampshire. The energy is currently delivered to an interstate transmission network and sold in three New England states including New Hampshire. NEP appeals from a judgment of the New Hampshire Supreme Court upholding the state statute as applied by the PUC. The questions presented are:

1. Whether the New Hampshire statute as applied by the PUC to secure the economic benefits of hydroelectric energy generated within the state exclusively for the citizens of that state unduly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.

2. Whether Part I of the Federal Power Act, vesting comprehensive licensing authority in the Federal Energy Regulatory Commission ("FERC") over NEP's hydroelectric projects, preempts the statute as applied by the PUC.

3. Whether Part II of the Federal Power Act, vesting exclusive jurisdiction in FERC over wholesale sales of electricity in interstate commerce, preempts the state statute as applied by the PUC to require NEP to rearrange its existing wholesale tariffs and contracts to effect a transfer of the economic benefits of the hydroelectric energy to New Hampshire citizens.

PARTIES TO THE PROCEEDING BELOW

All of the parties appearing before the New Hampshire Supreme Court are listed in the caption.

Appellant New England Power Company is a wholly-owned subsidiary of New England Electric System, a registered holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.* Appellant is a parent of Connecticut Yankee Atomic Power Company, Maine Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation and Yankee Atomic Electric Company and an affiliate of Granite State Electric Company, Massachusetts Electric Company, The Narragansett Electric Company and New England Energy Incorporated.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court (App. A, *infra*, pp. 1a-14a) is not yet reported. The PUC's Report and Order dated August 27, 1980 (App. B, *infra*, pp. 15a-24a) and its Report and Order dated September 19, 1980 (App. C, *infra*, pp. 25a-40a) are also unreported.

JURISDICTION

This is an appeal from a final judgment of the New Hampshire Supreme Court upholding a New Hampshire

statute as applied by the New Hampshire Public Utilities Commission to ban the export of hydroelectric energy generated within the state. The court rejected claims that the statute as so applied violates the Constitution and laws of the United States. Judgment was deemed to have been entered on December 23, 1980, when the decision of that court was docketed by its clerk. A notice of appeal was filed below on January 12, 1981 (App. D, *infra*, p. 41a). This Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises questions concerning the validity of New Hampshire's hydroelectric export statute, NH RSA 374:35, under the Commerce and Supremacy Clauses of the United States Constitution (art. I, § 8, cl. 3 and art. VI, cl. 2) and the Federal Power Act (16 U.S.C. §§ 792-824k).

NH RSA 374:35 provides:

> Permission Required. No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention to do so with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

Article I, Section 8, clause 3 of the United States Constitution provides:

> The Congress shall have Power
>
> * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes; . . .

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The relevant portions of the Federal Power Act are set forth in Appendix E, *infra*, pp. 42a-46a.

STATEMENT OF THE CASE

This case involves an attempt by one state to secure the economic benefits of one of its natural resources exclusively for the benefit of its own citizens. The resource in question — hydroelectric energy — is currently delivered to a highly integrated, regional transmission grid serving all of New England. The New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling the energy outside of New Hampshire. The immediate result of the order, if allowed to stand, will be higher electric rates for many Rhode Island and Massachusetts consumers and lower rates in New Hampshire.

A. Facts

NEP is a public utility which generates and transmits electricity at wholesale in interstate commerce. Its principal customers are three retail affiliates which resell the electricity at retail to over one million customers in Massachusetts, Rhode Island and New Hampshire. About 420 megawatts of NEP's total generating capacity consists of hydroelectric units located within New Hampshire on the Connecticut River. These hydroelectric units are all licensed by the Federal Energy Regulatory Commission ("FERC"), successor to the Federal Power Commission, under Part I of the Federal Power Act (App. A, p. 2a).

NEP is a member of the New England Power Pool ("NEPOOL"), a highly integrated, regional power pool whose members own virtually all of the bulk generation and transmission facilities located in the six-state New England region (App. A, p. 3a). All of NEP's generating units, including the Connecticut River plants, are connected to the regional transmission network. NEP's units and all other major New England generating units are dispatched by NEPOOL on an economic basis without regard to generation ownership or state lines. All energy so generated flows freely in the transmission network throughout the six-state region (NEP Exs. 2; 7, pp. 1-3).[1]

NEP's wholesale sales are comprehensively regulated by FERC under Part II of the Federal Power Act (App. A, p. 9a). The costs and benefits of its hydroelectric units, as well as its other units, are allocated to its customers in Massachusetts, Rhode Island, and New Hampshire through rates and contracts on file with and approved by FERC. In addition, the dispatch of NEP's units by NEPOOL is

[1] References are to the record before the PUC.

governed by an agreement investigated and approved by FERC under Part II. *New England Power Pool Agreement*, Opinion 775 (FPC, 1976), *affirmed*, *Municipalities of Groton* v. *Federal Energy Regulatory Commission*, 587 F.2d. 1296 (D.C. Cir. 1978).

B. Proceedings Before the PUC; the Federal Questions

Since 1913, New Hampshire has had in effect a statutory scheme — now codified in relevant part in NH RSA 374:35 — requiring utilities which operate hydroelectric units in New Hampshire to obtain permission from the PUC to transmit their electricity to points outside New Hampshire. Prior to the instant proceeding, the PUC had never withheld such permission.

On November 21, 1979, the PUC instituted its first investigation under the statute to determine whether it should withdraw permission previously granted NEP to export hydroelectric energy generated at NEP's Connecticut River plants. In December 1979, NEP moved to dismiss the proceedings on the ground that the PUC lacked authority under the statute to prohibit the export of hydroelectric energy. NEP challenged the statute, as invoked by the PUC, on three federal grounds: (1) it would place an undue burden on interstate commerce, (2) it is preempted by FERC licensing authority over NEP's hydroelectric projects under Part I of the Federal Power Act, and (3) it is preempted by FERC's regulation of NEP's wholesale sales under Part II of the Act.

The PUC deferred ruling on NEP's motion to dismiss and conducted hearings on the merits of an export restriction. Finally, on August 27, 1980, the PUC denied NEP's motion and held that RSA 374:35 validly confers juris-

diction on the PUC to restrict hydroelectric exports (App. B, pp. 15a-24a).

On September 19, 1980, the PUC issued its Report and Order on the merits (App. C, pp. 25a-40a). The PUC withdrew permission to export hydroelectric energy and directed NEP to make arrangements to sell the energy solely to utilities or consumers within New Hampshire (App. C, p. 40a). The PUC did not, however, order NEP to prevent the energy from physically crossing state lines. Under the PUC's order, this hydroelectric energy will continue to be delivered to the regional transmission network; the economic benefits of the energy, however, will be confined to New Hampshire.

C. The Decision Below

NEP appealed the PUC's August 27 and September 19 orders to the New Hampshire Supreme Court asserting the same federal constitutional and statutory challenges it had raised before the PUC. The court rejected NEP's federal claims and upheld RSA 374:35 as applied by the PUC (App. A, pp. 1a-14a).

The court concluded that the New Hampshire export statute as applied by the PUC did not run afoul of the Commerce Clause (App. A, pp. 6a-8a, 10a-12a). In the court's view, Congress affirmatively granted the state authority to restrict hydroelectric exports by inserting a savings clause in Section 201(b) of Part II of the Federal Power Act (App. A, pp. 7a-8a).

The court also found no conflict between the New Hampshire statute as applied by the PUC and the regulatory schemes embodied in Parts I and II of the Federal Power Act. The court reconciled the PUC's order with FERC's

exclusive Part II jurisdiction over wholesale electric rates by characterizing the order as no more than an assertion of "control of the assignment of the power" (App. A, p. 12a). At the same time, however, the court acknowledged that to accomplish this reassignment "new rates, contract modifications, or accounting adjustments . . . may naturally flow from the export termination" (App. A, p. 14a).

The court remanded the case to the PUC for implementation, concluding (*id.*):

> [NEP] must make appropriate adjustments and filings with the appropriate federal and State administrative agencies to enable New Hampshire to regain the benefit of its hydroelectric power.

THE QUESTIONS ARE SUBSTANTIAL

New Hampshire's attempt to secure the economic benefits of hydroelectric generation exclusively for its own citizens raises fundamental questions under the Commerce and Supremacy Clauses of the Constitution. If allowed to stand, New Hampshire's action will frustrate implementation of regional and national solutions to today's energy crisis. Other states with significant energy resources will be encouraged to stop sharing them or impose onerous conditions on their sale in interstate commerce.

The Court has already set down for plenary review another state's attempt through an exorbitant coal severance tax to impede interstate commerce. *Commonwealth Edison Co.* v. *Montana*, No. 80-581, probable jurisdiction noted, — U.S. —, 49 U.S.L.W. 3428 (Dec. 9, 1980). New Hampshire's scheme is even more blunt. New Hampshire seeks not to tax a commodity destined for interstate commerce; it seeks to capture the *entire* economic advantage of hydroelectric energy already in interstate commerce.

The decision below upholding New Hampshire's hydroelectric export statute as applied by the PUC is inconsistent with the fundamental values underlying the Commerce Clause. It also undercuts the federal regulatory framework embodied in Parts I and II of the Federal Power Act for the development of hydroelectric projects for the benefit of interstate commerce and for the regulation of wholesale sales of electric energy in interstate commerce. Plenary review is warranted.

1. New Hampshire's Hydroelectric Export Statute as Applied by the PUC Violates the Commerce Clause

The PUC's Order applying NH RSA 374:35 unduly burdens interstate commerce by preventing NEP from selling its hydroelectric generation outside New Hampshire. The power to regulate commerce among the states is a federal power, vested in Congress by the Commerce Clause. Absent Congressional consent, a state may not unduly burden interstate commerce. For this reason, state attempts to bar goods from or regulate the sale of goods in interstate commerce have been consistently invalidated. See, *e.g.*, *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911) ("*West*"), which invalidated a state statute prohibiting exportation of natural gas, *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) ("*Attleboro*"), which invalidated state regulation of the interstate sale of electricity at wholesale, and *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979), which invalidated a state statute prohibiting transportation and sale of minnows out of state.

These decisions are grounded in the philosophy, manifested in the Commerce Clause, that state regulation of interstate commerce will endanger the public interest in a

national economy by encouraging trade wars between the states, *West, supra,* 221 U.S. at 255-56, and by preventing " . . . the free flow of both raw materials and finished goods in response to the economic laws of supply and demand". *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976). The importance of energy supplies to the vitality of the national economy, and to the New England economy in particular, is beyond question. Since the New Hampshire statute as applied by the PUC flatly prohibits the sharing of significant energy resources between consumers of electricity in New Hampshire and in its neighboring states, the statute so applied violates the Commerce Clause.

The New Hampshire Supreme Court conceded that the export statute, standing alone, would probably violate the Commerce Clause (App. A, p. 10a). The court, however, read the savings clause in Section 201(b) of the Federal Power Act (16 U.S.C. 824(b))[2] as an affirmative grant of power by Congress to the states to regulate the exportation of hydroelectric energy (App. A, pp. 7a-8a). The court totally misconstrued the savings clause.

Section 201(b) was passed in 1935 as part of Congress' effort to plug the gap caused by *Attleboro's* prohibition seven years earlier against state regulation of interstate sales of electricity at wholesale. The result was Part II of the Federal Power Act (16 U.S.C. §§ 824-824k) which vests exclusive jurisdiction over such sales in FERC. *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 311 (1953) *("California").*

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[2] Section 201(b) provides in pertinent part:

(1) The provisions of [Part II] . . . shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.

Contrary to the ruling below, Section 201(b) does not purport affirmatively to grant authority; it merely directs that nothing in Part II should be construed to preempt existing lawful state authority. The words "deprive" and "lawful authority now exercised" are not words of grant, but words insulating valid laws regulating hydroelectric exports from the preemptive reach of Part II. This is the thrust of the savings clause's legislative history, in which Congressman Rogers of New Hampshire feared that the original Senate version, not containing a savings clause, would "deprive certain states . . . of certain rights which they have over exportation of hydroelectricity which is transmitted across the State line."[3] He therefore asked that New Hampshire be allowed "to continue . . . to exercise" those rights. 79 Cong. Rec. 10527 (1935).

This Court recently ruled that a savings clause in another federal statute strikingly similar to Section 201(b) does not confer additional authority upon the states otherwise barred by the Commerce Clause. *Lewis* v. *B T Investment Managers*, 447 U.S. 27, 64 L. Ed. 2d 702, 720 (1980). The Court found nothing in the savings clause or its legislative history indicating a Congressional intent to give the states new power not already possessed. Instead, "it appears that Congress' concern was to define the extent of the federal legislation's preemptive effect on state law." *Id.*

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[3] Prior to Part II's enactment in 1935, three states in addition to New Hampshire had statutes regulating the export of hydroelectric energy: Maine Rev. Stat. (1916), ch. 60, sec. I, p. 985; Maine Rev. Stat. (1930), ch. 68, sec. 1; Wisconsin Stat. (1931), sec. 31.27; West Virginia Acts (1929), ch. 58. Maine has since repealed its law. Public Laws of Maine (1955), ch. 402, p. 400. West Virgina's export statute was held unconstitutional on other grounds in 1931. *Hodges* v. *Public Service Commission*, 110 W. Va. 649, 159 S.E. 834 (1931). The Wisconsin statute is currently codified at sec. 196; 375 Wisc. Stats. (1977).

Nothing in the language or legislative history of Section 201(b) suggests that Congress intended to exempt state hydroelectric export statutes from the restrictions of the Commerce Clause. When Congress has wished to express such an intent, it has done so explicitly, using language that specifically allows a state to regulate certain interstate commerce as though it were purely local. See, *e.g.*, *In re Rahrer*, 140 U.S. 545 (1891) (upholding the Wilson Act of 1890, 26 Stat. 313); *Clark Distilling Co.* v. *Western Md. Ry.*, 242 U.S. 311 (1917) (upholding the Webb-Kenyon Act of 1913, 37 Stat. 699); and *Whitfield* v. *Ohio*, 297 U.S. 431 (1936) (upholding the Hawes-Cooper Act of 1929, 45 Stat. 1084).[4] The Section 201(b) savings clause bears no resemblance to the specific Congressional authorizations in those cases. Absent such explicit authorization, the state statute must be judged in the first instance under traditional Commerce Clause standards. See, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 620 n.4 (1978) (concluding that even a broad savings clause providing that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies" did not shield a state waste disposal law from the restrictions of the Commerce Clause).

In short, the narrow savings clause contained in Section 201(b) does not insulate the New Hampshire export statute from scrutiny under the Commerce Clause, and the statute clearly cannot withstand that scrutiny. New Hampshire's attempt to hoard the economic benefit of its natural resources contravenes the central principles underlying the

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[4] These cases serve as the authority for the proposition that Congress may "permit the States to regulate the commerce in a manner which would otherwise not be permissible." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945).

Commerce Clause. See *Hughes* v. *Oklahoma, supra; H.P. Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949); *West, supra.*[5]

2. The New Hampshire Statute as Applied by the PUC is Preempted by Part I of the Federal Power Act

NEP's hydroelectric projects are licensed by FERC under Part I on the assumption that their electric generation will benefit interstate commerce. Part I was enacted to provide for ". . . the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest . . ." *Federal Power Commission* v. *Union Electric Company*, 381 U.S. 90, 98 (1965). "The principle use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy." *Id.*, 381 U.S. at 99.

To this end, Congress established in Part I a comprehensive regulatory scheme which conditions the construction and operation of hydroelectric projects on navigable waters upon the issuance of a license by FERC. Section 4(e) (16 U.S.C. § 797(e)) establishes federal licensing jurisdiction over any person desiring to construct, operate, or maintain a facility for the development, transmission, and utili-

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[5] We do not argue that all applications of the New Hampshire statute would be invalid under the Commerce Clause. Carefully tailored state regulation of the physical exportation of hydroelectric energy to conserve scarce water resources or to protect health threatened by the unavailability of electricity would not unduly burden interstate commerce. *Compare, Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 186-88 (1950). In this case, however, the state has acted solely to gain an economic advantage for its citizens.

zation of water power on navigable waters. Such licenses are issued on the condition, among others, that the project " . . . will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce. . . ." Section 10(a) (16 U.S.C. § 803(a)).

To determine whether a proposed project constitutes the best comprehensive plan for "interstate commerce", FERC must consider, as a central part of its analysis, the extent to which the project will contribute to the interstate transmission of electricity. *Federal Power Commission* v. *Union Electric Co., supra,* 381 U.S. at 100-01. Thus, when FERC issues a license for a hydroelectric project under Part I of the Federal Power Act, it does so on the condition that the energy generated thereby will be used to benefit interstate commerce.

Nothing in Part I authorizes the states to defeat the purpose of federal licensure, since federal authority in this field is exclusive and final. See *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152, 165-166, 181 (1946). To hold otherwise would grant the states a "veto power [which] easily could destroy the effectiveness of the federal act . . . [and] would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission. . . . " *Id.,* 328 U.S. at 164.

The Connecticut River was found to be navigable in 1941. *Bellows Falls Hydro-Electric Corp.,* 2 F.P.C. 380 (1941). Since then, each of the six hydroelectric stations involved in this case has been and is now licensed under Part I of the Federal Power Act. By attempting to retain the economic benefits of hydroelectric energy generated at these stations

exclusively for New Hampshire residents, the PUC challenges the premise of federal licensure — that the Nation's waterways shall be developed for national, rather than local and parochial advantage. Since there is nothing in Part I which saves New Hampshire's export restriction from preemption, the New Hampshire statute as applied by the PUC must fall under the Supremacy Clause.

The Section 201(b) savings clause, which on its face applies only to Part II of the Act, does not insulate the New Hampshire statute from Part I preemption. The 1935 savings clause, however, does implicitly recognize some "lawful authority" of the states over hydroelectric exports. The savings clause and Part I are easily reconciled.

As originally enacted in 1920, Part I left relatively unregulated hydroelectric projects on non-navigable waters. Part I was extended by a non-retroactive 1935 amendment to projects which might affect interstate commerce. Section 23(b) (16 U.S.C. § 817). Thus, in 1935, there were many hydroelectric projects free of federal licensing requirements. In fact, NEP's New Hampshire projects had not then been licensed since that part of the Connecticut River was not then thought to be navigable. In enacting the Section 201(b) savings clause, Congress would have seen no Part I barrier to the application of state export statutes to many hydroelectric projects.

3. The New Hampshire Statute as Applied by the PUC is Preempted by Part II of the Federal Power Act

As the New Hampshire Supreme Court recognized (App. A, p. 14a), the PUC's Order will ultimately require NEP to rearrange its existing wholesale rates and contracts. Yet, Part II of the Federal Power Act (16 U.S.C. §§ 824-824k)

grants FERC comprehensive and exclusive jurisdiction over the interstate transmission and sale of electricity at wholesale, *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 215 (1964) (*"City of Colton"*), including transmission and sales from hydroelectric projects licensed under Part I. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 418-9 (1952). Since the PUC's order far exceeds the limited state authority over hydroelectric energy exports recognized by Congress in Section 201(b) of Part II, it is inconsistent with FERC's pervasive regulation of interstate wholesale electric energy transactions under Part II. It therefore must give way to superior federal authority.

As noted *supra*, Part II was passed in response to this Court's decision in *Attleboro* that states have no authority to regulate wholesale sales of electricity transmitted in interstate commerce. Congress gave that authority to FERC in Part II by declaring that federal regulation of such sales is in the public interest, Section 201(a) (16 U.S.C. § 824(a)), and by allowing federal jurisdiction to follow the physical flow of such energy across state lines. Section 201(b) (16 U.S.C. § 824(b)); *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 529 (1945). FERC jurisdiction over the interstate transmission and sale of electricity at wholesale exists no matter how small the quantity of interstate transmission is involved. *Federal Power Commission* v. *Florida Power & Light*, 404 U.S. 453, 461 n. 10 (1972).

Part II applies with full force to NEP's business, which consists almost entirely of the interstate sale of electricity at wholesale. NEP's transmission lines are interconnected with NEPOOL's interstate transmission network to enable NEP's generating units to be dispatched by NEPOOL.

NEP sells electric power at wholesale to three affiliated retail distribution companies, and to some thirty non-affiliated utilities, in Massachusetts, New Hampshire and Rhode Island. By virtue of the integration of its multistate facilities which support its interstate sales of electricity at wholesale, NEP is regulated by FERC. See *Connecticut Light & Power Co.* v. *Federal Power Commission, supra; Jersey Central Power & Light Co.* v. *Federal Power Commission,* 319 U.S. 61, 67-68, 70-71 (1943).

The PUC's order directly interferes with FERC's regulation by directing NEP to make arrangements for the sale of its hydroelectric energy to New Hampshire customers. This order will require NEP substantially to alter its current contracts, rates, and services which are already subject to exclusive FERC regulation. NEP will have to offer new contracts to New Hampshire utilities to cover the sale of the hydroelectric energy. NEP will also have to change its wholesale rates for all of its remaining customers to reflect the fact that only its New Hampshire customers will receive the benefits and associated costs of this hydroelectric energy.

If done by NEP independently, any such rearrangement of its existing array of wholesale contracts would require FERC approval. The new "arrangements", whatever their form, would be contracts or rates for wholesale electric service in interstate commerce. Since Section 205(b) of Part II (16 U.S.C. § 824d(b)) prohibits discrimination in rates "as between localities", it is doubtful that FERC would approve any filing package that secured the economic benefits of hydroelectric power for a class of wholesale customers in one locality (New Hampshire) to the detriment of wholesale customers in other localities (Massachusetts and Rhode Island).

In any event, New Hampshire lacks the authority to order a rearrangement of NEP's wholesale contracts and tariffs. Whatever state authority over hydroelectric energy is preserved by the Section 201(b) savings clause, authority over wholesale sales from an integrated, interstate power grid is not included. As this Court has expressly noted, the hydroelectric export savings clause "appears not to have been drafted with state rate regulation in mind," but was intended to preserve the validity of state statutes prohibiting or regulating the "*volume* of state power exported." *California, supra,* 345 U.S. at 300-301 n. 4 (emphasis added). By contrast, the PUC's order does not touch the volume of hydroelectric energy physically flowing across New Hampshire borders. The energy will continue to flow in the New England grid as dispatched by NEPOOL. Instead, the PUC has simply ordered an adjustment in wholesale tariffs to accomplish a transfer of the economic benefits of the power. This action is preempted by Part II.

CONCLUSION

Probable jurisdiction should be noted. The Court may want to consider summary reversal.

Respectfully submitted,

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January 1981.

APPENDIX A

[OPINION AND JUDGMENT OF
NEW HAMPSHIRE SUPREME COURT]

PUBLIC UTILITIES COMMISSION

No. 80-396

APPEAL OF NEW ENGLAND POWER COMPANY

(Public Utilities Commission)

December 23, 1980

• • •

DOUGLAS, J. This case involves the validity of an order of the New Hampshire Public Utilities Commission (hereinafter "PUC") pursuant to RSA 374:35 withdrawing from the New England Power Company (hereinafter "NEPCO") permission to transmit hydroelectricity generated in New Hampshire to other States. We affirm the order and remand.

On November 21, 1979, the PUC instituted an investigation under RSA 374:35 to determine whether it should revoke its earlier approval of the exportation of electric power generated by hydroelectric facilities located in New Hampshire. RSA 374:35 provides:

> "*Transmitting Electricity Out of the State Permission Required.* No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such

business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use."

NEPCO moved to dismiss the proceedings for lack of subject matter jurisdiction. The PUC denied the motion. On September 19, 1980, after several hearings, the PUC issued the order in controversy, and NEPCO filed a timely appeal to this court. The order reads as follows:

"ORDERED, that the permission granted New England Power Company (NEPCO) to transmit hydroelectric energy from within the boundaries of the State to outside the State is hereby withdrawn as of thirty (30) days from the date of this Order; and it is

FURTHER ORDERED, that NEPCO make arrangements to sell the previously exported hydroelectric energy to persons, utilities and municipalities within the State of New Hampshire within thirty (30) days of the date of this Order; and it is

FURTHER ORDERED, that upon the completion of both units at Seabrook the Commission will again re-examine the issue of exportation."

We granted a stay of the order to preserve the status quo ante pending our decision on the merits.

I. BACKGROUND

NEPCO is a public utility predominantly engaged in the generation of electricity for sale in the wholesale market. As part of its generating mix, NEPCO owns and operates six hydroelectric generating stations comprised of twenty-seven units along the Connecticut River in New Hampshire and Vermont. All six stations are federally licensed under Part I of the Federal Power Act, 16 U.S.C. §§ 792-823. The

twenty-one units located in New Hampshire have a capacity of 420 megawatts.

NEPCO sells the power produced by these stations to wholesale customers in New Hampshire, Massachusetts, and Rhode Island. The energy is dispatched through a regional power-pooling system composed of sixty utilities in New England (NEPOOL), comprising ninety-eight per cent of the generating capacity in New England. NEPCO sells seventy-five per cent of its power in Massachusetts. Less than six per cent of New Hampshire's population presently receives energy from NEPCO's regular wholesale customers.

Uniquely, while the Connecticut River separates the States of Vermont and New Hampshire, the river up to the low water mark on the Vermont side lies *within* the State of New Hampshire. *Vermont* v. *New Hampshire*, 289 U.S 593, 619-20 (1933); *see* RSA 1:1 to :8. The northern part of the Connecticut River is, therefore, owned by the people of the State of New Hampshire. *See McGilvra* v. *Ross*, 215 U.S. 70, 79 (1909). The right of private parties to use it to produce electricity for use outside New Hampshire has been limited by RSA 374:35, :36, with the PUC, in effect, the citizens' legislatively delegated "trustee."

Pursuant to its statutory authority, the PUC has, from time to time, approved NEPCO's requests to export hydroelectric power. *See, e.g., Connecticut River Power Co. & New England Power Company*, 36 N.H.P.U.C. 302, 311-12 (1954); *Grafton Power Company*, 12 N.H.P.S.C. 194, 201 (1929). NEPCO concedes that since 1926 it or a predecessor company has obtained permission from the PUC to export electricity from all plants in New Hampshire except Vernon Station, which was constructed prior to 1913.

According to the PUC, the surplus of power produced in New Hampshire during the first half of this century justified the PUC's grants of permission to export in those years. In the late 1920's hydroelectricity provided forty-five per cent of New Hampshire's energy and, with the exception of Maine, this was the highest percentage of electricity so produced anywhere in the country. In 1951 the percentage had risen to forty-nine per cent. Today, the biggest retail seller of electricity in the State, Public Service Company of New Hampshire, serves eighty-three per cent of the population, but its generating mix includes only 4.6 per cent produced by hydroelectric stations, according to the PUC. NHPUC Report accompanying Order 14,492 at 6 (Sept. 19, 1980).

II. The Federal Power Act

NEPCO argues that Parts I and II of the Federal Power Act, 16 U.S.C. §§ 792-824k, preempt RSA 374:35. Traditionally, the regulation of electric utilities was a function performed by State governments under their police power. Federal legislation may supersede such State regulation, but only if Congress expressly so provides or if Federal and State laws conflict. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-26 (1977). When it enacted Parts I and II of the Federal Power Act, Congress did not expressly preempt State law as it has in other statutes. *See, e.g.*, Depository Institutions Deregulation and Monetary Control Act of 1980 § 511 (a), Pub. L. No. 96-221, 94 Stat. 132 (to be codified in 12 U.S.C. § 86a); Act of December 28, 1979 § 202, amending the Federal Deposit Insurance Act (12 U.S.C. § 1811-1831), Pub. L. No. 96-161, 93 Stat. 1233 (to be codified in 12 U.S.C. § 1831a). Our inquiry, therefore, must

be whether the federal law so conflicts with State law as to preempt it.

Congress' primary objective in enacting Part I of the Federal Power Act, 16 U.S.C. §§ 792-823, was to control comprehensively the development of water power along the nation's navigable waterways through the issuance of licenses to construct and operate dams and reservoirs. *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 400-05 (1975). Congress did not preempt the entire field of electric utility regulation when it enacted Part I, which left the States with their traditional jurisdiction over electric utilities, except for matters relating to the issuance of licenses. *See First Iowa Coop.* v. *Power Comm'n*, 328 U.S. 152, 171 (1946). For example, State regulation of intrastate sales of electricity to ultimate consumers, such as the retail customers of Public Service Company of New Hampshire, remains in State hands. 16 U.S.C. § 813.

NEPCO argues that the PUC's interpretation and application of RSA 374:35 conflicts with the licensing power of the federal government under Part I. We disagree. The PUC's order does not require compliance with RSA 374:35 as a condition precedent to securing a federal license under Part I. *See First Iowa Coop.* v. *Power Comm'n, supra* at 170. New Hampshire has not sought to stop hydroelectric development of the Connecticut River and does not challenge the licenses granted to NEPCO over the years under Part I of the Federal Power Act. Because we find that there is no conflict between RSA 374:35 and Part I, we conclude that the federal statute does not preempt the State law.

The more difficult question is whether Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k, preempts RSA

374:35. Seven years after the enactment of Part I, Rhode Island sought to regulate the rates at which a utility within that State sold power to a wholesale customer in Massachusetts. The Supreme Court of the United States held that such rate regulation was an impermissible burden on interstate commerce. *Pub. Util. Comm'n* v. *Attleboro Co.*, 273 U.S. 83, 90 (1927).

As a result of the *Attleboro* decision, there was no regulation of interstate electric rates. Such regulation is within the exclusive domain of Congress under the commerce clause. *Id.* In 1935, Congress chose to fill the gap by enacting Part II. The legislative history of that amendment includes the following:

> "Title II of the bill makes certain amendments to the present Federal Water Power Act and establishes for the first time regulation of electric utility companies transmitting energy in interstate commerce . . . . Under the decision of the Supreme Court of the United States in *Public Utilities Commission* v. *Attleboro Steam & E. Co.*, (273 U.S. 83), the rates charged in interstate wholesale transactions may not be regulated by the States. Part II gives the Federal Power Commission jurisdiction to regulate these rates."

H.R. REP. NO. 1318, 74th Cong. 1st Sess. 7-8 (1935). Thus, Congress clearly expressed an intention to preempt the field of regulation of rates charged in the *interstate* transmission of electricity.

However, § 201(b) of the statute specifically exempted certain State laws from federal jurisdiction. As enacted, that subsection provided:

> "The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but *shall not apply* to any other sale of electric

> energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line . . ."

(emphasis added). 49 Stat. 847 (current version at 16 U.S.C. § 924(b) (Supp. 1980)).

The legislative history of that section explains the purpose of that language. When the bill reached the House of Representatives, the Senate version did not contain the language regarding "lawful" authority of States to control the flow of hydroelectricity produced by their waters; the House Commerce Committee inserted it. H.R. REP NO. 1318, 74 Cong. 1st Sess. 27 (1935). Said Congressman Rogers of New Hampshire:

> "Just one further word. I do want to call attention, if I have a moment, to the fact that as a result of the service rendered by the junior Senator from New Hampshire [Senator Fred H. Brown] on the public service commission of our State, we for a long time, have had a public service commission which properly protects the rights of the citizens as against these damnable curses [public utility companies]; but the Senate bill as originally drawn would deprive certain states, I think *five* in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House Committee, and I hope when you come to it, section 201 of part II, that you will *grant* us the privilege to continue, as we have been for *22 years*, to exercise our State right over the exportation of hydroelectric energy transmitted across State lines but produced up there in the granite hills of New Hampshire."

79 CONG. REC. 10527 (1935) (emphasis added). The twenty-two years refers quite obviously to the 1913 legislation in New Hampshire amending the 1911 Public Service Commission Act, presently RSA 374:35. Thus the subsec-

tion was specifically intended to preserve the power of a State or its commission over exportation of electricity under then existing laws similar to the New Hampshire statute, which were recognized as valid and lawful. *See Safe Harbor Water Power Corporation*, 5 F.P.C. 221, 235 (1946); *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 300 n.4 (1953).

III. Federal Constitution

The Commonwealth of Massachusetts, and other amici curiae, argue that Congress could not constitutionally enact § 201(b). They assert that, while Congress may exempt *all* States from an exercise of congressional authority under the commerce clause, it may not legislate with respect to some States and exempt others. But the amici present no authority. Nothing requires that the commerce clause be exercised in a totally uniform manner geographically. *Secretary of Agri.* v. *Cent. Roig Co.*, 338 U.S. 604, 616 (1950). In fact, the Supreme Court has expressly noted that there is no rule that Congress must legislate equally with respect to all States or not at all. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328-29 (1966).

The amici argue that the privileges and immunities clause of the United States Constitution, U. S. CONST. art. IV, § 2, also prohibits such an act of Congress. The only authority they are able to cite is a footnote in a treatise, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-31 at 403 n.18 (1978). We are unable, however, to find a single case that holds that the privileges and immunities clause restricts Congress's power under the commerce clause. *See generally Haavik* v. *Alaska Packers Ass'n*, 263 U.S. 510, 515 (1924); *Duchay* v. *Acacia Mut. Life Ins. Co.*, 105 F.2d

768, 775 (D.C. Cir. 1939); *Lung* v. *O'Cheskey*, 358 F.Supp. 928, 931 (D.N.M.), *aff'd mem.*, 414 U.S. 802 (1973). The fact that Article IV generally applies to the States leads us to conclude that the privileges and immunities clause was meant to apply to the States and not to Congress.

Massachusetts argues that if the PUC order goes into effect consumers in that State will be deprived of property without just compensation in violation of the fourteenth amendment of the U.S. Constitution. We find that argument to be without merit. Massachusetts's argument is based on the speculative premise that NEPCO will be able to increase its rates to consumers in that State to reflect the loss of cheaper hydroelectric power but that NEPCO will not make adjustments to offset the expenses of operating and maintaining those plants. NEPCO, however, is subject to the Federal Energy Regulatory Commission's (hereinafter "FERC") jurisdiction in the establishment of rates. 16 U.S.C. § 824d. *Cf. FPC* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972). FERC has the authority to hold hearings upon the lawfulness of any proposed rate and to suspend a rate change pending the hearing. 16 U.S.C. § 824d(e). The burden of proof that an increased rate is just and reasonable is upon the utility. *Id.* Massachusetts has not shown us that its projected scenario will ever occur. If it does, the Commonwealth may raise its argument at that time.

Relying on *Fry* v. *United States*, Massachusetts argues that the tenth amendment prohibits Congress from exercising its power under the commerce clause "in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 421 U.S. 542, 547 n.7 (1975). That phrase, however, refers to the function of the States

vis-a-vis the federal government and not with respect to other States. The tenth amendment prohibits the federal government from infringing on State sovereignty with regard to "integral governmental functions." *National League of Cities* v. *Usery*, 426 U.S. 833, 855 (1976). Regulation of electric utilities is not an essential State governmental function, and the tenth amendment does not prohibit the act of Congress in this case.

NEPCO argues that RSA 374:35 as construed and applied in the PUC order violates the commerce clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3.

New Hampshire was one of the thirteen sovereign States that created the federal government and delegated to it certain enumerated powers, among which was the power of Congress to regulate commerce among the States. U.S. CONST. art. I, § 8, cl. 3. Control over the interstate transmission of electricity is within the commerce power of Congress. *FPC* v. *Union Electric Co.*, 381 U.S. 90, 94 (1965); *Pub. Util. Comm'n.* v. *Attleboro Co.*, 273 U.S. at 86. Congress exercised that power when it enacted the Federal Power Act, 16 U.S.C. §§ 792-828c. In issuing its order, the PUC acted within its authority as expressly preserved by § 201(b) of that act. 16 U.S.C. § 824(b). While it might be questionable, in the absence of § 201(b) of the Federal Power Act, that there would be authority for New Hampshire to interdict the flow of electricity that would otherwise continue to benefit two sister States, *see Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), that is not the case here. Congress, through its commerce clause power may "permit the states to regulate the commerce in a manner which would not otherwise be permissible. . . . " *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945).

NEPCO correctly points out that the United States Supreme Court has ruled that parochial State laws that impede the flow of goods or natural resources into interstate commerce are infirm under the commerce clause. *See, e.g., Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949) (milk); *Foster Packing Co.* v. *Haydel*, 278 U.S. 1 (1928) (shrimp); *Oklahoma* v. *Kansas Nat. Gas Co.*, 221 U.S. 229 (1922) (natural gas). *But see Reeves, Inc.* v. *Stake*, 48 U.S.L.W. 4746, 4750 (June 19, 1980) (upholding the right of South Dakota to withhold processed cement, which it produces, from the interstate market). Those cases are distinguishable in that none of them involved the express consent of Congress in the exercise of its commerce power.

The question remains whether the PUC's order falls within the exemption provided by Congress. NEPCO and the other States argue that the PUC order is an attempt to control electric rates in violation of the commerce clause. They assert that all hydroelectric power goes into an interstate transmission grid and is mixed with other power, but the PUC does not intend that NEPCO cut its lines running from its hydroelectric plants into the grid and construct new lines running only to New Hampshire utilities. Rather, NEPCO argues that the PUC intends that NEPCO simply adjust its rates to give New Hampshire consumers the benefit of the price of hydroelectricity.

The PUC order is plain. Under RSA 374:35 it withdraws permission to export hydroelectric power and orders that it be sold to New Hampshire consumers. Its purpose is to give New Hampshire the benefit of that power of which its residents now get only about six per cent. Since the power is presently mixed in the grid, NEPCO must decide what part of the power is being assigned to Massachusetts and Rhode Island in order to determine its charges to custom-

ers in those States. It can comply with the PUC's order not to export hydroelectric power by the same method and simply determine that all of the hydroelectric power going into the grid is assigned to New Hampshire. This is not a control of rates but rather a control of the assignment of the power. If NEPCO can now determine that over ninety per cent is going outside New Hampshire, it can determine that one hundred per cent will remain in New Hampshire.

The PUC does not challenge the jurisdiction of the FERC (as successor to the Federal Power Commission) over utilities selling solely in intrastate markets energy that has been generated wholly or in part from out of State. *See FPC* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972); *F.P.C.* v. *Southern Cal. Edison Co.*, 376 U.S. 205 (1964). The latter cases did not turn on the *mere interconnection* of a utility with an interstate transmission grid because just about every utility in the country is so connected. If the matter were that simple, then FERC, and not the fifty State regulatory bodies, would control all but the most remote, miniscule, and obscure utilities in the country.

The PUC did not err in its construction of the State statute at issue and properly gave notice and held lengthy hearings and investigations during the past year. Our sister States could and did fully participate before the PUC.

IV. Findings of the PUC

Next, NEPCO asserts that the PUC's findings are unjust and unreasonable. This court will not overturn the PUC unless its findings are arbitrary, unjust, or unreasonable as a matter of State law. *Legislative Util. Consumers' Council* v. *Public Util. Com.*, 117 N.H. 972, 974, 380 A.2d 1083, 1084 (1977). The question is not whether *some* power is now

needed in New Hampshire but whether the PUC is justified in concluding that *hydro*-generated power "is reasonably required for use within this state and that the public good requires that it be delivered for such use." RSA 374:35.

New Hampshire is the fastest growing State north of Florida and east of the Mississippi River. The population of the State rose 21.5 per cent from 1960 to 1970 and 24.6 per cent from 1970 to 1980, approximately 1.6 times faster than the entire nation and 1.7 times faster than the region from 1960 to 1970. Rhode Island has actually lost population during the last few years. The growth in power demand in New Hampshire may outpace capacity by 1982-83. We cannot conclude that the PUC was in error or that it did not have sufficient evidence before it when it declined to predict whether the capacity of the Seabrook Nuclear Power Station would alleviate that shortfall.

The PUC concluded that hydroelectric power is cheaper to the extent of approximately $25 million a year, depending on seasonal flow of the river and other factors. That power would help replace the expensive oil-fired generation on which most of New Hampshire now depends. One expert pointed out that the Public Service Company of New Hampshire's rate per kilowatt hour exceeds NEPCO's rate by about 25 per cent. Due to line losses, hydroelectric power can be more economically delivered in this State. Rates to New Hampshire consumers are higher due to the lack of access to New Hampshire's major hydroelectric stations' output; the dollar savings to New Hampshire consumers, if the power is sold within this State, would be substantial.

RSA 374:35 clearly authorizes the action of the PUC. Authority under the statute is not confined to situations where there is a shortage of power regardless of price but

whenever it is "reasonably required for use within the State." When the cost of power produced by other methods becomes exorbitant, the less expensive hydroelectric power becomes reasonably required for use within the State. The economic needs of New Hampshire consumers are such that the public good requires that the hydroelectric power be delivered for their use instead of being exported. We find no retaliatory or improper motive on the part of the PUC. There is no "public good" in requiring New Hampshire to import expensive OPEC oil so that it may continue to export the cheaper hydroelectric power. We uphold the findings of the PUC.

V. Implementation

Finally, NEPCO argues that the PUC order is so vague and ambiguous that it cannot comply. Nothing on the face of the PUC order requires new rates, contract modifications, or accounting adjustments, but these may naturally flow from the export termination. The PUC has required NEPCO "to make arrangements to sell" its hydroelectric power in New Hampshire, and NEPCO must do so. It is not clear to this court how some of these "arrangements" will be made. We therefore remand for the parties to develop the mechanics of implementation. NEPCO must make appropriate adjustments and filings with the appropriate federal and State administrative agencies to enable New Hampshire to regain the benefit of its hydroelectric power.

Remanded.

All concurred.

APPENDIX B

[PUC Report and Order No. 14,456]

DE 79-223

NEW ENGLAND POWER COMPANY

[Entered August 27, 1980]

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REPORT

On December 28, 1979, New England Power Company (NEPCO) filed a Motion to Dismiss in these proceedings for lack of subject matter jurisdiction. NEPCO contends that NHRSA 374:35 cannot constitutionally confer jurisdiction on the New Hampshire Public Utilities Commission to regulate NEPCO's transfer of hydroelectricity from New Hampshire. Further, NEPCO alleges that such regulation is invalid under both the Commerce Clause of the United States Constitution and the Federal Power Act.*

NEPCO argues that the Commission is precluded from action pursuant to RSA 374:35 as a result of Supreme Court decisions precluding a state from imposing an undue burden on interstate commerce. The interstate transmission of electric current from one state to another NEPCO views as interstate commerce. Thus, NEPCO arrives at the conclusion that a state cannot enact or enforce any regulation

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* The Rhode Island Attorney General agrees with NEPCO on the matter of jurisdiction.

which unduly burdens or discriminates against the interstate transmission of electricity. *Attleboro Steam & Electric Co.* v. *Public Utilities Commission*, 273 U.S. 83 (1927). Based on the aforementioned reasoning, NEPCO concludes that any action pursuant to NHRSA 374:35 is an unconstitutional exercise of state power.

NEPCO then proceeds to embark on a discussion of the various Supreme Court cases which warn of the balkanization of the states' unity and the potential for rivalries and retaliation if one state is allowed to prohibit or restrict interstate commerce. *West* v. *Kansas Natural Gas*, 221 U.S. 229, 249-255 (1911). *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923). *Hood* v. *DuMond*, 366 U.S. 525, 538-539 (1949).

To illustrate the potential for retaliation, NEPCO cited the interconnections of NEPOOL and the potential for other New England states to preclude New Hampshire from the benefits of New England nuclear units outside New Hampshire.

These arguments lead to NEPCO's assertion that a state is without power to burden interstate commerce in this fashion for the exclusive benefit of its own residents. Consequently, NEPCO finalizes this argument by stating that NHRSA 374:35 and any order issued pursuant to the statute are unconstitutional by operation of the Interstate Commerce Clause of the United States Constitution.

NEPCO also challenges the Commission's jurisdiction under the Federal Power Act. While noting that portions of the Federal Power Act leave limited authority to the states with respect to the hydroelectric projects, NEPCO

offers the proposition that no provision authorizes a state prohibition on the exportation of hydroelectric power. NEPCO further argues that state laws such as RSA 374:35 are pre-empted because otherwise such laws would interfere or frustrate the Federal Energy Regulatory Commission's (FERC) overall scheme of water utilization.

NEPCO concedes that Part II of the Federal Power Act provides that no state will be deprived of its lawful authority now exercised over the exportation of hydroelectric power. In pursuit of its motion, NEPCO offers that exemptions such as the aforementioned must be narrowly construed. Furthermore, NEPCO contends that the rate-making provisions of the Federal Power Act clearly define the FERC's jurisdiction on rates. For the aforementioned reasons NEPCO submits that the proceeding in DE 79-223 should be dismissed for lack of subject matter jurisdiction.

COMMISSION ANALYSIS

Article I, Section 8, Clause 3 of the United States Constitution confers upon the Congress of the United States the authority to regulate interstate commerce. While that authority is exclusively in the United States in some instances, it does reside concurrently with the states in other instances. The authority of the states to regulate interstate commerce can be divided into two categories, when Congress has acted and when it has not.

Where Congress has not acted, the states may not regulate interstate commerce if the state's regulation would place an undue burden on that commerce or where the article of commerce is so national in nature as to be amenable only to a national scheme of regulation. Where these two factors are not present the states may regulate inter-

state commerce in the absence of legislation by the United States.

Where Congress has acted, the states may exercise their authority over the article of interstate commerce concurrently with the United States unless the state's regulation is inconsistent with the scheme of regulation adopted by the United States, or where the United States has entirely pre-empted the field.

A review of NEPCO's contentions reveal that they cannot be sustained.[1] It is well settled that a state may not, upon its own authority, prohibit the introduction of an article into interstate commerce. *West* v. *Kansas Natural Gas Company*, 221 U.S. 229, 55 L.Ed. 716 (1911). However, the Congress may authorize a state to regulate interstate commerce where, but for such authorization, the state would be prohibited from doing so. *Auclair Transportation Inc.* v. *State*, 113 N.H. 231, 234 (1973).

In the field of the generation and sale of electrical energy, the Congress has enacted a scheme of regulation which, while reserving certain aspects of the subject to the United States, is scrupulous in its recognition and preservation of the interests of the several states. 16 U.S.C.A. 792 *et seq.* *United States* v. *Public Utilities Commission*, 345 U.S. 295, 97 L.Ed. 1020 (1952). In that legislation the Congress has authorized the states to regulate the exportation of hydroelectric energy generated within the state, at least insofar as the states exercised such control over that hydroelectric energy in 1920. 16 U.S.C.A. 824 (b). That section, as amended through the present states:

"The provisions of this subchapter (subchapter II) . . . *shall not . . . deprive a State or a State Commission* of

[1] The Commission has sought the opinion of its attorney in the Attorney General's office. His analysis concurs with our analysis.

its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a state line . . ." (Emphasis supplied)

When the bill, which subsequently became the aforementioned statute, was introduced into the House of Representatives it failed to contain the quoted clause. However, the bill was amended so as to insert the quoted clause. Speaking in support of the addition of that clause, Representative William A. Rogers of New Hampshire stated that the bill, as originally drafted, would have deprived certain states of "certain rights which they have over the exportation of hydroelectric energy", and that the amendment would preserve those rights. 79 *Cong. Rec.* 10527.

The Federal Power Commission, the agency charged with the enforcement of the statute held:

"The legislative history of this provision *79 Cong. Rec. 10527* shows that it has reference to certain existing state statutes which purported to prohibit or restrict the exportation of hydroelectric energy. Eg., *Me. Rev. Stat. (1930) ch. 68 sec. 1; N.H. Laws (1929) ch. 106; W. Va. Acts (1929) ch. 58; Wis. Stat. (1931) sec. 31.27.*" *Safe Harbor Water Power Corporation*, 5 FPC 221, 235 (1946).

The aforementioned interpretation was approved by the United States Supreme Court in *United States* v. *Public Utilities Commission*, 345 U.S. 295, 97 L.Ed. 1020, 1029-1030, at note 4. There the Supreme Court verified that the statute was "intended to preserve the validity of certain state statutes prohibiting or regulating the volume of state power exported."

To clarify, the Congress specifically recognized the interests of the State of New Hampshire in controlling the use of its hydroelectric energy and specifically authorized the State of New Hampshire to exercise that control. The

statute under which this Commission has conducted this proceeding was specifically recognized by the federal agency charged with administering the federal regulatory scheme as coming within the grant of authority to the states. Finally, that construction was specifically approved by the United States Supreme Court. The various cases cited by NEPCO describe generally accepted principles of federal supremacy but are inapplicable to the instant case because of the specific grant of authority.

NEPCO's arguments fail to focus on the specific question of whether or not this State has the authority to determine where the power from hydroelectric plants located within the State (*State of Vermont* v. *State of New Hampshire*, 290 U.S. 579 (1934)) can be sold. The Commission answers this question in the affirmative.

Past decisions of this Commission clearly support the Commission's finding. In *Grafton Power Company*, 12 N.H.P.S.C. 194, 201 (1929) this Commission clearly conditioned its permission to transfer the power out of state. The following is taken from the report and order of Commissioner Mayland H. Morse:

> Said Grafton Power Company shall discontinue such business in whole or in part, to such extent and under such notice as the commission may order, whenever after notice and hearing thereon the Public Service Commission shall find that such electrical energy, or any portion thereof affected by this order is reasonably required for use within this state, and that the public good requires that it be delivered for such use. (Page 201)

Similar passages appear in all orders issued by this Commission whereby permission was granted to transmit the power outside the State. When New England Power came

before the Commission in 1954, 19 years after the amendments to the Federal Power Act, the company specifically requested that the Commission "permit and approve New England Power Company's engaging in such business, including the transmitting or conveying of electrical energy generated by water power beyond the confines of New Hampshire." (NEPCO's Petition dated November 15, 1954).

In the Commission's report and order in that case the following condition was imposed to the approval:

> "Further ordered, that New England Power Company be, and hereby is, permitted to engage in the business of transmitting or conveying electrical energy generated by water beyond the confines of New Hampshire on the statutory conditions of sections 33 and 34 of Chapter 289 of the Revised Laws of New Hampshire, as amended, namely, that New England Power Company shall discontinue such export, in whole or in part, to such extent and under such conditions as this Commission may order, if this Commission finds that such electrical energy or any portion thereof is reasonably required for use within this State, and that the public good requires that it be delivered for such use, such service within this State to be upon terms as favorable as shall be granted to consumers outside the State, having due regard for all the facts and conditions which may affect the subject."

Connecticut River Power Co. & New England Power Company, 36 N.H.P.U.C. 302, 311-312 (December 3, 1954).

Therefore, it is clear that NEPCO by its 1954 petition recognized the Commission's jurisdiction and authority as to the transmission of hydroelectric power outside the State. The order in that proceeding specifically conditioned the approval on the possibility that at sometime in the future the permission could be discontinued. Finally, NEPCO did not appeal the Commission's aforementioned

order. Based on the foregoing NEPCO can neither claim lack of subject matter jurisdiction, lack of notice, or surprise.

NEPCO's concerns relating to balkanization and retaliation are unfounded. First, as has been noted this specific delegation refers only to hydroelectric power. The possibility for retribution by disallowing New Hampshire access to nuclear plants in other states cannot be reasonably offered considering that New Hampshire utilities have an ownership interest in all New England Yankee Nuclear units. As to withholding power from oil units, given today's economics it is doubtful that this would occur or be a potential threat. However, each of these scenarios implies that New Hampshire has chosen a path of balkanization. Such a conclusion fails to recognize over fifty years of sharing one of its most vital resources, the Connecticut River. New Hampshire was sharing its resources decades before the creation of the New England Power Pool.

An historical examination of our files reveals that the aforementioned 1954-NEPCO decision was issued before proceedings accepting the arrangement were heard by the Massachusetts Department of Public Utilities. (December 3rd vs December 7, 1954). Clearly the Massachusetts DPU was aware of the terms imposed by the New Hampshire Commission. Furthermore, the creation of NEPOOL years later was based upon consideration of the existing laws within each New England State.

Finally, recognition must be given to the specific policy determination by the United States Congress which specifically continued the statutory lives of the existing hydroelectric exportation statutes in the four states of which only New Hampshire's remains. This jurisdiction is not a delib-

erate attempt at balkanization but rather a sanctioned power belonging to the State of New Hampshire.

Based upon the foregoing, the Commission denies the NEPCO motion to dismiss. Our Order will issue accordingly.

J. MICHAEL LOVE
Chairman

Concurring:
August 27, 1980

PAUL R. MCQUADE, *Commissioner*

FRANCIS J. RIORDAN, *Commissioner*

DE 79-223

NEW ENGLAND POWER COMPANY

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SUPPLEMENTAL ORDER No. 14,456

Upon consideration of the foregoing Report, which is made part of this Order, it is hereby

ORDERED, that the Motion to Dismiss filed by New England Power Company is denied.

By order of the Public Utilities Commission of New Hampshire this twenty-seventh day of August, 1980.

VINCENT J. IACOPINO
Executive Director and Secretary

APPENDIX C

[PUC Report and Order No. 14,492]

DE 79-223

INVESTIGATION INTO THE TRANSFER OF HYDRO-ELECTRIC POWER OUTSIDE OF NEW HAMPSHIRE

[Entered September 19, 1980]

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REPORT

Jurisdictional Challenges

The Commission by Report and Supplemental Order No. 14,456 has already determined jurisdiction over the exportation of hydro-electric power pursuant to RSA 374:35 and 36. Contrary to the assertions of NEPCO and the Rhode Island Attorney General, there remains life in these two statutes. The Commission, in the aforementioned Order, cited the various provisions of the Federal Power Act that allowed the continuation of state jurisdiction in the area of hydro-electric exportation. The Commission noted that through the efforts of New Hampshire Congressman William A. Rogers, the Congress passed the amended Federal Power Act which specifically reserved existing state rights over the exportation of hydro-electric power produced within the State. *Safe Harbor Water Power Corporation*, 5 FPC 221, 235 (1946). With the passage of the Federal Power Act, there existed four states which had existing statutes controlling the exportation of hydro-electric power: Maine Revised Statutes (1930) ch. 68, section 1; West Vir-

ginia Acts (1929) chapter 58; Wisconsin Statutes (1931) section 31.27 and New Hampshire Laws (1929) chapter 106. These four statutes, which prohibited or regulated the exportation of state power, were held to have continuing validity by the United States Supreme Court. *United States* v. *Public Utilities Commission*, 345 U.S. 295, 97 L.Ed. 1020, 1029-1030, Note 4.

The Commission proceeded to analyze its past decisions where the Commission consistently reserved its statutory right to alter in whole or in part any approval to transfer hydro-electric power outside the State. *Grafton Power Company*, 12 N.H.P.S.C. 194, 201 (1929); *Connecticut River Power Co. & New England Power Company*, 36 N.H.P.U.C. 302, 311-312 (December 3, 1954). The Commission noted that NEPCO itself sought our approval in the latter proceeding through its initial petition (NEPCO's petition dated November 15, 1954).

Further research has revealed that contrary to its present position, New England Power specifically recognized the Commission's continuing jurisdiction as to the exportation of hydro-electric power *after* the passage of the Federal Power Act in *1935*. The following passage from New England Power Company's *1948* Prospectus[1] is illustrative and conclusive as to jurisdiction:

> In the case of a company engaged in the generation of electric energy by water power in New Hampshire, such company is prohibited from transmitting such energy outside of New Hampshire unless the company first obtains the consent of the New Hampshire Public Service Commission. The statute provides for the discontinuance of such transmission outside of New Hampshire to

[1] NEPCO, First Mortgage Bonds, Series B, 3%, dated July 1, 1948.

the extent the New Hampshire Public Service Commission finds that the electrical energy is reasonably required in New Hampshire. No such consent has been obtained with reference to energy generated at the Bellows Falls Development or at the present Wilder Development of Bellows Falls Hydro-Electric Corporation because such generation is in Vermont. However, the Company is bound by a stipulation given in 1927 by Bellows Falls Hydro-Electric Corporation to the State of New Hampshire, that electricity should be delivered in New Hampshire for use within that State in such amount as should be ordered by the New Hampshire Public Service Commission under such regulations as to rates and service as may be from time to time determined by such Commission. No such orders have been issued pursuant to this stipulation. Consent has been obtained for the transmission out of New Hampshire of such energy to be generated at the Wilder Development following the redevelopment as is, at the time, in excess of that which can be marketed within the state at fair rates. (Page 18) Exhibit X-3 NHPUC Docket D-#2771, FPC Docket #E6145.

The Commission has found through its analysis in Order No. 14,456 that it has jurisdiction pursuant to RSA 374:35 and 36 to evaluate the remaining questions in this proceeding. NEPCO's position in the past has been that this Commission has the jurisdiction and the power to consider approving or halting the transfer of hydro-electric power outside the boundaries of the State. NEPCO has not offered any compelling legal criteria as to why its position of today is contrary to its position in 1948 and 1954.

Statutory Requirements of RSA 374:35

RSA 374:35 states the following:

Permission Required. No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the

same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

To alter or to discontinue an approval to transmit hydroelectric energy beyond the confines of the State, RSA 374:35 sets forth certain requirements and standards to be considered.

The first statutory requirement imposed upon the Commission is notice to New England Power and subsequent hearings thereon. This requirement has been satisfied by the Commission's Report and Order No. 13,913 and the subsequent hearings held pursuant to this docket.

The statute then proceeds to impose two standards. The first is a finding that the electrical energy or the portion thereof affected by an order is reasonably required for use within the State of New Hampshire. The second necessary evaluation relates to the question of whether or not the public good requires that the hydroelectric power be delivered for use within the State.

Electrical Energy Need Within the State of New Hampshire

There are five hydroelectric projects presently located along the Connecticut River within the boundaries of the State of New Hampshire. At these five sites, there are twenty-one units which have a total capacity of 419.8 megawatts.[2] The amount of energy generated by these units has averaged nearly a billion kilowatt hours a year over the past six years.[3] These units were built primarily within the time frame of 1920 to 1956.[4] The permission granted to transmit this hydroelectric power outside the State was first provided in 1929 and continued through subsequent decisions to 1954.[5] This proceeding is the first re-examination of this issue since that time period.

The population growth rate in New Hampshire has increased dramatically since 1954. In the time period between 1960 and 1970, New Hampshire added 130,760 people or a 21.5% increase.[6] Between 1970 and 1980 the State population increased by another 24.6%.[7]

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[2] NEPCO Exhibit 1-D

[3] Staff Exhibit #9 Schedule I

[4] NEPCO Exhibit 1-B

[5] *Grafton Power Company*, 12 N.H.P.S.C. 194, 201 (1929) *Connecticut River Power Company & New England Power Company*, 36 N.H.P.U.C. 302, 311-312 (December 3, 1954)

[6] LUCC Exhibit I

[7] 1980 United States Census

In comparison with both the United States and New England as an entirety, New Hampshire grew considerably faster over the 1960 to 1980 time period. During 1960 to 1970, New Hampshire grew at a rate 1.7 times faster than the region as a whole, which then increased to a rate of 5.5 times faster for the second decade. New England's slow growth rate can largely be attributed to an essentially stagnant growth period in Southern New England.[8]

The magnitude of this stagnation in Southern New England is illustrated by Rhode Island's actual net population loss over this period. Equally relevant is the testimony that New Hampshire's growth is primarily from immigration of which the leading contributor was Massachusetts at 39%.[9]

The relevance of these population trends to the issues in this proceeding is extremely clear. Since the last PUC order allowing the transmission of this hydroelectric power outside the State, consumers in Massachusetts and Rhode Island have been receiving ever increasing levels of New Hampshire hydroelectric power per customer while New Hampshire has been receiving dramatically lesser power on per customer basis from units located within the State. The immigration of people from the remainder of New England to New Hampshire has resulted in a shift in the very market that the prior exportation orders were designed to serve.

Another example of the changed circumstances facing New Hampshire's energy future is in the comparison of the generating sources serving New Hampshire presently

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[8] LUCC Exhibit I

[9] LUCC Exhibit I

and the generation mix when the permission to export the hydroelectric power was first granted. In the late 1920's, New Hampshire had forty-five percent of its electrical energy provided by hydroelectric power. With the exception of Maine, this was the highest percentage of any state in the United States.[10] Equally impressive, New Hampshire also had the second lowest level of purchased power indicating a high degree of self-sufficiency.[11] In 1951, New Hampshire had over forty-nine percent of its electrical energy needs met by hydroelectric generation.[12] Obviously, there was a surplus of hydroelectric power which justified the orders granting permission to export of the 1920's and 1950's.

The present generating mix is markedly different from that encountered in the 1920's and 1950's. The state's largest electric utility, Public Service Company of New Hampshire serves 83% of the total population in the state. Its generating mix includes only 4.6% of the power generated by hydroelectric plants.[13] The available hydroelectric energy is from the 48 MW of hydro capacity which PSNH owns.[14]

New England Power Company provides energy to less than 6% of the State's population, and has a maximum

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[10] *Grafton Power Company*, 12 N.H.P.S.C. 194 (1929). Commission file D-1222 "Electrical World" June 2, 1928 p. 1179. DE 79-208 *Small Power Producers and Cogenerators* Report and Order #14,470 p. 4

[11] "Electrical World" June 2, 1928 p. 1179

[12] *Small Power Producers and Cogenerators* DE 79-208 Report and Order #14,470

[13] Staff Exhibit 9 Schedule VIII

[14] Transcript, January 29, 1980, p. 24

peak of 79 MW.[15] Yet New England Power Company has 419.8 MW of hydroelectric capacity which is used by and large to service consumers outside New Hampshire.

The effect of this unbalanced use of hydroelectric generation is the major reason for the higher costs per KWH of PSNH, by approximately 25% over NEPCO as demonstrated by Staff witness Gertler.[16]

Another factor that relates to an accurate assessment of the electrical energy needs of New Hampshire is the projected load growth within the State and the plants scheduled to meet that need in the future. Staff # 1 and 8 are NEPOOL's most recent peak growth projections in which the data is segregated and examined by state. These exhibits predict that the load growth in New Hampshire will be higher over the next ten years than either Massachusetts or Rhode Island. NEPOOL predicts in this 1979 study that the load growth in New Hampshire will in the base case be 5.0%.

PSNH's most recent, 1980, forecast predicts a peak growth of 5.0% for its system. When the Commission examined PSNH's 1979 peak load projection, the Commission determined that at that time the proper range was between 4.2% and 5.0%.[17] Staff has used the 5.0% prediction to examine peak growth for the next ten years and the plants scheduled to meet the increased demand. Staff witness Traum expressed concern that during certain years between now and when both units are operational at Seabrook, PSNH may be required to enter into contracts for one or two entitlements in existing units. Mr. Traum's

[15] Staff Exhibit 6, Schedule II

[16] Staff Exhibit 8, Schedule IV

[17] Commission Docket I-SF 14,829- 14,831 (1979)

exhibits also reveal entitlements purchased from *NEPCO* for oil fired capacity in certain years before the completion of Seabrook.[18]

Staff witness Traum's testimony reveals two key determinants for answering the question of New Hampshire's energy needs. First, the fact that PSNH will need to make additional purchases of capacity in the years leading to the completion of Seabrook establishes an available market for the hydroelectric power within the State. Second, his analysis reveals that at the same time that NEPCO is exporting hydroelectric power from New Hampshire, it is planning to enter into contracts to transfer oil generated power back into the State to serve the energy needs of the electric utility, PSNH, which provides electrical power to 83% of New Hampshire's residents either directly or indirectly. Such an ironical situation clearly establishes the market for the electrical energy from the hydroelectric plants along the Connecticut River within this State.

Staff witness Traum also examined the plants scheduled to meet the State's energy needs in the future, Seabrook I and II. Mr. Traum noted that the projected in-service dates for these units have always been delayed, never advanced. Based on this historical analysis and the reduction in the construction work force, Mr. Traum reached the conclusion that Seabrook I and II would not be in service on the dates presently predicted by PSNH, April 1, 1983 and February 1, 1985 respectively.

Mr. Traum then proceeded to develop an historical delay regression which yielded a set of different in service dates which he then averaged with PSNH's present estimate to arrive at a revised estimate for the two in-service dates of

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[18] Staff Exhibit #6 Schedule 4

1985 and 1989. This led Mr. Traum to his ultimate conclusion that the longer the delay is in bringing Seabrook into service, the more compelling the need for the hydroelectric power to remain in New Hampshire.

Recently, the Commission reviewed the projections of in service dates for both Seabrook units. The Commission concluded that the various labor strikes coupled with the volatile financial markets and the failure of the Massachusetts DPU to approve the divesture had postponed the operational dates for Seabrook I and II to 1984 and 1986, respectively.[19] While continued delay in the divesture approval may result in further delay because of our recent order in DR 79-187, it is clearly established that the delay in these units requires that the State have access to the energy and capacity from the hydroelectric units on the Connecticut River at least until the completion of both Seabrook units.

NEPCO contends in brief that the new 1980 NEPOOL forecast may lend to a lower peak growth projection for the State of New Hampshire. However, the new forecast does not provide a state by state breakdown. Consequently, the Commission will have to await the completion of its examination of this issue pursuant to DE 80-47. The evidence offered by NEPCO does not in of itself prove that the demand of PSNH has changed due to the absence of state by state data. Furthermore, the delays in the completion date of the two Seabrook units coupled with NEPCO's exportation of hydroelectric power while attempting to sell back to New Hampshire oil fired electricity outweighs any consideration as to NEPCO's contention.

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[19] DR 79-187 Report and Order #14,490 page 9 footnotes 12-16 (Sept. 18, 1980)

The Commission finds that based on the testimony and exhibits of witnesses Traum, Gertler and MacLellan, there has been a demonstrated need for the hydroelectric power presently being exported outside the State and that it is reasonably required for use within the State. Factors, which include the delay of both Seabrook I and II, the increased population in the State since the decisions allowing export, the worsening generation mix, NEPCO's practice of selling to PSNH oil fired capacity while exporting New Hampshire hydro capacity, as well as the unfavorable distribution of hydroelectric facilities in service to New Hampshire residents, all clearly support this finding both individually and collectively.

PUBLIC GOOD STANDARD

The public good can be advanced by achieving goals such as providing electric service at the lowest possible cost, and achieving a fair distribution of limited natural resources. Staff witness Gertler testified that if the exportation of the hydroelectric power was discontinued and the power was used within the State of New Hampshire, there would be an annual savings of approximately 25 million dollars a year.[20] Such a result is clearly within the realm of the public good because of its extremely beneficial effect on the citizens of the State of New Hampshire. Ms. Gertler's analysis disclosed that the per capita income for the State of New Hampshire has been and is presently below that of the states in Southern New England. Ms. Gertler's analysis also revealed that the price paid for electrical energy in New Hampshire is higher than NEPCO's price for the states it serves.

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[20] Staff Exhibit 9

The historical records contained in the Commission files reveal that there was substantial takings of New Hampshire land for purposes of flooding, and construction of the various hydroelectric units and supporting structures. See *Grafton Power Company*, 12 N.H.P.S.C. 194 (1929), *Connecticut River Power Company & New England Power Company*, 36 N.H.P.U.C. 302 (1954) (also interim transfers contained in our files). These takings created a vested interest in the plants for the citizens of New Hampshire. Contrary to the Massachusetts A.G's position, the Commission has not ignored the concerns of other States rather the Commission has reviewed its past records to reveal all the considerations that led to the earlier exportation orders.

The aforementioned decisions reveal that all financings, construction and operation of these hydroelectric facilities was done with a clear recognition that the State of New Hampshire had made considerable efforts to assist the development of these units and the only consideration given to New Hampshire was that upon the appearance of a market for the power within the State, the power would be delivered. Questioning by the existing Attorney General for New Hampshire in 1928 revealed that the power could always be delivered cheaper within the State than outside the State because of line losses. (See Transcript September 21, 1928 page 25 *Grafton Power* docket). A state has an interest in controlling the use of its natural resources. Such conditions that are necessary to protect the misuse of these limited resources falls within the public good.

The testimony in this proceeding reveals that the continued allowance of exportation of this power directly harms the public of the State of New Hampshire. Recently, PSNH sought temporary loans from its Seabrook partners so as to be able to continue the construction of Seabrook

until the next major financing. NEPCO, a partner in the ownership of Seabrook, refused to loan the money unless PSNH agreed to buy any necessary capacity from NEPCO that it might need between the present and the advent of Seabrook no matter what the cost.[21] PSNH refused and NEPCO chose not to make the temporary loan thereby jeopardizing the continuation of the plant.

Testimony in DR 79-187, which the Commission administratively takes notice, reveals that on at least one other occasion NEPCO attempted to impose conditions on a short term temporary loan and seriously jeopardized the continuation of the plant. In making the aforementioned condition concerning power purchases, NEPCO was able to rely upon its excess capacity situation which is in part directly related to its ability to export the Connecticut River hydroelectric power. Since the Commission has found the construction of Seabrook to be in the public interest, an use of our natural resources which jeopardizes this interest cannot be viewed as within the public good.

Equally distressing is the conflicting positions of the Massachusetts Attorney General. In proceedings before the Massachusetts DPU, the Mass. Attorney General has continually attempted to block the Seabrook divesture based in large part on the need for power.[22] Yet again the exportation of the hydroelectric power allows another interest in another state to use the exported power as a lever to block actions which will greatly aid the public good within the State of New Hampshire. It is directly contrary to the State of New Hampshire's interest to have an officer

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[21] July 29, 1980 Transcript page 70 through 74

[22] DR 79-187 Report and Order #13,962, page 11 (December 26, 1979)

of another state attempt to block efforts to establish new energy sources found to be in the public good while relying upon energy and capacity from this State. Obviously, the continuation of exportation would lead to further incorrect economic signals.

The hydroelectric power from the Connecticut River dams is presently used for peaking with some use as base load. The units PSNH will be buying from prior to the completion of the two Seabrook units will also be peaking but with one major difference, they will be oil fired. There is a substantial difference between the costs of this hydroelectric power and power generated from oil fired units. To allow PSNH and other New Hampshire utilities to be forced to increase the amount of their generating capacity by turning to oil fired units when there exists hydroelectric peaking power within the State would not be in the public good.

The Commission has found that any increased usage within the State will be met by increased reliance upon oil until the units at Seabrook can be completed and the Schiller Station converted to coal.[23] Since the Staff exhibits 1, 6, and 8 all reveal that there will be growth in energy usage during the years leading to the operation of Seabrook, it is clear that the public good requires greater use of the State's natural resources so as to reduce the reliance upon oil for increased usage of electricity.

The Commission has already discussed that regardless of any order of this Commission Seabrook I and II have been delayed to 1984 and 1986. This delay gives further support to finding that the public good requires a discon-

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[23] DR 79-187 Report and Order #14,490 (December 26, 1979)

tinuance of the transfer of hydroelectric power outside the State at least until the two plants are built.

Upon a review of the two standards set forth by RSA 374: 35, the Commission finds that there is a market for the hydroelectric power presently being exported out of the State and that the power is reasonably required for use within the State. The Commission further finds, that the discontinuance of the exportation of the power in lieu of use within the boundaries of the State is in the public good at least until the two units are operational at Seabrook.

Our Order will issue accordingly:

J. MICHAEL LOVE PAUL R. McQUADE FRANCIS J. RIORDAN

COMMISSIONERS

September 19, 1980

INVESTIGATION INTO THE TRANSFER OF HYDRO-ELECTRIC POWER OUTSIDE OF NEW HAMPSHIRE

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SECOND SUPPLEMENTAL ORDER No. 14,492

Upon consideration of the foregoing Report, which is made a part hereof; it is

ORDERED, that the permission granted New England Power Company (NEPCO) to transmit hydroelectric energy from within the boundaries of the State to outside the State is hereby withdrawn as of thirty (30) days from the date of this Order; and it is

FURTHER ORDERED, that NEPCO make arrangements to sell the previously exported hydroelectric energy to persons, utilities and municipalities within the State of New Hampshire within thirty (30) days of the date of this Order; and it is

FURTHER ORDERED, that upon the completion of both units at Seabrook the Commission will again re-examine the issue of exportation.

By order of the Public Utilities Commission of New Hampshire this nineteenth day of September, 1980.

/s/ VINCENT J. IACOPINO

VINCENT J. IACOPINO
Executive Director and Secretary

APPENDIX D

[NOTICE OF APPEAL]

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

APPEAL OF NEW ENGLAND POWER COMPANY
Docket No. 80-396

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
[Filed January 12, 1981]

Notice is hereby given that New England Power Company, the appellant above-named, hereby appeals to the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(2) from the final judgment of the New Hampshire Supreme Court entered on December 23, 1980, which upheld against constitutional challenge, NH RSA 374:35 and Order No. 14,492 of the New Hampshire Public Utilities Commission.

Respectfully submitted,

NEW ENGLAND POWER COMPANY

By its attorney

/s/ RICHARD B. COUSER, Esquire

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APPENDIX E

FEDERAL POWER ACT

Section 4(e) of the Federal Power Act (16 U.S.C. § 797(e)) The Commission is hereby authorized and empowered —

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(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations. *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United

States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* that upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * *

Section 10(a) of the Federal Power Act (16 U.S.C. § 803 (a))

All licenses issued under this Part [I] shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development,

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and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

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Section 23(b) of the Federal Power Act (16 U.S.C. § 817(b))

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State or municipality shall not construct,

maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

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Sections 201(a) and 201(b) of the Federal Power Act
(16 U.S.C. §§ 824(a) and 824(b))

(a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part [II] and the Part next following [III] and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the United States.

(b)(1) The provisions of this Part [II] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted over a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part [II] and

the Part next following [III], over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

• • •

Section 205(b) of the Federal Power Act
(16 U.S.C. § 824(b))

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

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FILED
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ALEXANDER L. STEVAS,
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Nos. 80-1208, 80-1471 and 80-1610.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

NEW ENGLAND POWER COMPANY,
APPELLANT,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.,
APPELLEES.

COMMONWEALTH OF MASSACHUSETTS, et al.,
Appellants,
v.
NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL,
APPELLEE,

DENNIS J. ROBERTS II, ET AL.,
APPELLANTS,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.,
APPELLEES.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

Joint Appendix.

[Listing continued on inside cover.]

Appeal docketed January 19, 1981 in No. 80-1208, February 27, 1981 in No. 80-1471, and March 23, 1981, in No. 80-1610.
Probable Jurisdiction noted May 18, 1981.

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Nos. 80-1208, 80-1471 and 80-1610.

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ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

Joint Appendix.

1. Relevant Docket Entries.

a. New Hampshire Public Utilities Commission ("PUC").

(1.) Order No. 13,913 — Instituting Investigation (11-21-79).

(2.) Motion to dismiss of New England Power Company ("NEP") (12-28-79).
(3.) Rhode Island request to intervene (1-11-80).
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(5.) Hearing before the PUC, Day 1 (1-29-80).
(6.) Hearing before the PUC, Day 2 (6-25-80).
(7.) Hearing before the PUC, Day 3 (7-8-80).
(8.) Order No. 14,456 — denying NEP's motion to dismiss (8-27-80).
(9.) Order No. 14,492 — prohibiting NEP from exporting hydroelectric energy (9-19-80).
(10.) Motion of NEP for Rehearing, Clarification, and Suspension of Order No. 14,492 (9-26-80).
(11.) Motion of Commonwealth of Massachusetts for Rehearing and Suspension (10-1-80).
(12.) PUC Order No. 14,517 — denying motions of NEP and Massachusetts (10-6-80).
(13.) Motion of State of Rhode Island for Rehearing and Suspension of Order (10-7-80).
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b. New Hampshire Supreme Court ("NHSC").

(1.) NEP's Appeal by Petition pursuant to RSA 541:6 (10-8-80).
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(9.) Motion by Massachusetts for Remand to PUC to Hear New Evidence (11-10-80).

(10.) Order of NHSC denying Massachusetts' Motion for Remand (11-12-80).

(11.) Opinion and Judgment of NHSC (12-23-80).

(12.) NEP's Notice of Appeal to the Supreme Court of the United States (1-5-81).

(13.) NEP's Motion for Stay (1-5-81).

(14.) Massachusetts' Notice of Appeal to the Supreme Court of the United States (1-15-81).

(15.) NEP's Amended Notice of Appeal to the Supreme Court of the United States (1-12-81).

(16.) Rhode Island's Notice of Appeal to the Supreme Court of the United States (1-9-81).

(17.) Rhode Island's Motion for Stay (1-9-81).

(18.) Order of NHSC denying Motions of NEP and Rhode Island for Stay (1-14-81).

2. Orders of the New Hampshire Public Utilities Commission and Opinion and Judgment of the New Hampshire Supreme Court.

a. New Hampshire Public Utilities Commission.

(1.) Order No. 13,913 — instituting investigation (11-29-79).

DE 79-223 NEW ENGLAND POWER COMPANY
ORDER NO. 13,913

WHEREAS, NH RSA 374:35 states the following:

> Transmitting Electricity Out of the State
>
> 374:35 Permission Required. No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

WHEREAS, The New England Power Company presently transmits hydro capacity beyond the confines of the State;

WHEREAS, the rated capacity of these New England Power hydro units is in excess of 300 MW; and

WHEREAS, 300 MW of hydro capacity represents between ¼ and ⅓ the electrical peak demand of the State of New Hampshire; and

WHEREAS, the present fuel adjustment clauses of electrical utilities within the State are rising rapidly due to escalation in the price of oil and temporary shutdowns of nuclear units for repairs;

WHEREAS, the oil situation appears to be worsening; and

WHEREAS, the interests of New Hampshire towns existing near the hydro facilities operated by New England Power may have changed since the Commission first approved the transfer of hydro power outside the boundaries of the State of New Hampshire; and

WHEREAS, the New Hampshire General Court has recently passed RSA 362-A to encourage greater use of hydro capacity in meeting the electrical demands of New Hampshire consumers; and

WHEREAS, for the aforementioned reasons, the public good requires the Commission to investigate the question of whether or not to discontinue the transmission of this hydro energy outside the State of New Hampshire; and

WHEREAS, pursuant to RSA 374:35, 374:4, 378:7, 365:19 and 365:28, the Commission has the right to initiate its own investigation, a duty to keep informed, and the right to alter prior orders to conform with changing circumstances; it is hereby

ORDERED, that Docket No. DE 79-223 is hereby opened for the investigation into whether or not the Commission shall alter its approval, in whole or in part, of the transfer of hydro electricity outside the boundaries of New Hampshire; and it is

FURTHER ORDERED, that the aforementioned docket will include an investigation into whether or not New Hampshire electric utilities, towns, cities, cooperatives, or the State itself, should have greater access to this hydro power to meet electrical demand within the State of New Hampshire; and it is

FURTHER ORDERED, that New England Power shall file testimony as to why the Commission should not alter its operation of these facilities, in whole or in part, by December 28, 1979; and it is

FURTHER ORDERED, that any other interested party file testimony in favor or in opposition to such alteration by January 14, 1980; and it is

FURTHER ORDERED, that hearings will commence at 9:30 A.M. on January 29, 1980 at the office of the Commission, 8 Old Suncook Road, Concord, New Hampshire.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of November, 1979.

/s/_____
Vincent J. Iacopino
Executive Director and Secretary

3. Other parts of the record.

a. New Hampshire Public Utilities Commission ("PUC").

(1.) PUC: NEP Exhibit No. 1. Prefiled testimony of Russell A. Holden (1-29-80).

• • •

1. Q. Please state your full name, business address and position with the respondent New England Power Company.
   A. I am Russell A. Holden, my business address is 4 Park Street, Concord, New Hampshire, and I am Vice President of New England Power Company.
2. Q. Does New England Power Company contest the jurisdiction of the New Hampshire Public Utilities Commission to prohibit or restrict the company's transmission out of New Hampshire of power generated by the company at its hydroelectric facilities within New Hampshire?
   A. Yes, it does. The company has filed a motion to dismiss this proceeding for lack of jurisdiction. In filing this testimony concerning its hydroelectric facilities, New England Power Company does not waive its objection to the Commission's jurisdiction.
3. Q. How long have you been associated with New England Power?
   A. Since mid-1967 — over 12 years.
4. Q. Have you been involved in the company's business in New Hampshire over that period?
   A. Principally, in the company's business in New Hampshire and Vermont.
5. Q. Please outline your responsibilities as they pertain to New England Power.

A. New England Power is the wholesale generation and transmission subsidiary of the New England Electric System, a public utility holding company. As such, it generates electricity in bulk and buys electricity in bulk from other generating companies and transmits and sells such electricity, again in bulk, to the three affiliated retail distribution subsidiaries of the New England Electric System; Granite State Electric Company in New Hampshire, Massachusetts Electric Company in Massachusetts and The Narragansett Electric Company in Rhode Island. New England Power also transmits and sells electricity at wholesale for resale to some 30 non-affiliated distribution utilities. Among these are the New Hampshire Electric Cooperative and the Littleton Water and Light Department of Littleton, New Hampshire. The majority are municipal light departments of cities and towns in Massachusetts. The company participates in a number of interchange and economy transactions as well.

New England Power's generating and transmission facilities include hydroelectric generating projects and transmission lines and associated facilities in New Hampshire and Vermont, as well as generating facilities and transmission lines in Massachusetts. I am charged with executive responsibility for the company's business in New Hampshire and Vermont.

6. Q. Do you have responsibilities with respect to any other companies in New England Electric System?

A. I am also President and Treasurer of Granite State Electric Company and am charged with executive responsibility for its retail distribution business in some 23 cities and towns in New Hampshire. Granite

State purchases its entire supply of electricity at wholesale for distribution and resale from New England Power.

7. Q. Will you briefly outline the history of New England Power's hydroelectric activities on the Connecticut River?

A. They date back to 1907, when construction of the first hydroelectric project on the Connecticut River was commenced at a site between Hinsdale, New Hampshire and Vernon, Vermont. The Vernon project, as it is generally known, began operation in 1909, with the electricity generated there transmitted over 69 kV lines to industrial customers in Central Massachusetts. Vernon is still operating, over 70 years later. It now contains 10 generating units with a net capability of 28.5 MW. Eight of these units are located in New Hampshire and 2 in Vermont.

The next project on the Connecticut River was at Bellows Falls. At that site, New England Power is the successor to a company formed in 1792 to make the Connecticut River navigable around Bellows Falls by installing a system of locks and canals. The Bellows Falls project commenced the generation of electricity in 1928. It contains 3 generating units having a net capability of 49.0 MW, all of which are in Vermont.

The largest conventional hydro projects on the Connecticut River, and in New England for that matter, are New England Power's Comerford and Moore Stations on the upper part of the river. Comerford, which contains 4 generating units having a net capability of 167.0 MW, all of which are located in New Hampshire, commenced operations in 1930.

At about the same time, New England Power constructed the McIndoes Station, a small project with a

net capability of only 13.0 MW, all in New Hampshire, which has the specific purpose of regulating flows of water further down river by retaining some of the discharge from Comerford when it is operating at or near capacity.

Wilder Station, located between Wilder, Vermont and Lebanon, New Hampshire, went on line as the company's fifth Connecticut River project in 1950. Wilder has 2 units with a net capability of 36.0 MW. One unit is located in New Hampshire and one in Vermont. Wilder is at a site known as Olcott Falls, which was formerly the location of the Olcott Paper Company.

The last New England Power Company hydroelectric generating station to go on line on the Connecticut was Moore Station, which began operations in 1957. Like Comerford, Moore has 4 generating units with a net capability of 199.0 MW. All are located in New Hampshire.

8. Q. Does the company have any other hydroelectric projects?

A. Yes. They are all associated with the Deerfield River. The newest and largest is the Bear Swamp pumped storage project in Rowe, Massachusetts, with 2 units, each with a net capability of 300.8 MW. Bear Swamp began operations in 1974. Associated with Bear Swamp is a small river regulating project of 7.5 MW net capability called Fife Brook. In addition, there are a number of older projects in Massachusetts and Vermont. In Massachusetts, there are five stations in addition to the two previously mentioned. They are Deerfield No. 2, No. 3 and No. 4, each with a net capability of approximately 6.0 MW; No. 5, with a net capability of 15.5

MW and Sherman, with a net capability of 7.0 MW. In Vermont, there are two stations, Harriman, with 43.0 MW net capability and Searsburg, with a net capability of 5.0 MW.

9. Q. Who regulates the activities of New England Power?

A. New England Power is engaged primarily in the generation and transmission of electricity for sale at wholesale for resale in interstate commerce. Its wholesale rates are comprehensively and exclusively regulated by the Federal Energy Regulatory Commission ("FERC") under Part II of the Federal Power Act. The company also makes a small number of direct industrial power sales, which aggregate only 2/10 of 1% of its business or 37 million out of 16.7 billion kilowatthours. These sales are subject to regulation by the commissions of the states in which they are made.

With respect to its licensed hydroelectric power projects, of which four projects comprising six generating stations are located on the Connecticut River between New Hampshire and Vermont, the company is under the jurisdiction of FERC under Part I of the Federal Power Act.

Projects licensed under the Federal Power Act are also subject to federal controls with respect to navigation and navigational aids, installation of fishways and recreational areas, and they may also be subject to orders of the water resources boards or commissions of the states in which they are located.

New England Power's issues of securities are regulated by the Securities and Exchange Commission ("SEC") under the Public Utility Holding Company Act of 1935 and by the regulatory commissions of Massachusetts, New Hampshire, Vermont and, to some extent, Connecticut.

Also, the company's activities, as they might involve the safety of the electric facilities which it owns and/or operates, are under the jurisdiction of the state utilities commissions and in some cases of other state agencies, such as departments of public safety.

10. Q. Do all New England Power's hydroelectric projects operate more or less independently?

A. Just the opposite. For at least the last 40 years, the New England Electric System electric companies have operated as an integrated system and have been so regarded by both the SEC under the Holding Company Act and by the Federal Power Commission ("FPC"), which is now FERC.

Hydroelectric generation in New England is basically a peaking proposition. Except when seasonal or unusual weather conditions permit, our hydroelectric generating stations are operating mainly to meet peak load requirements on the system.

Base load requirements, on the other hand, are met from New England Power's steam-electric stations at Brayton Point and Salem, Massachusetts, plus, to some extent, Narragansett Electric Company's steam stations in Providence, Rhode Island, as well as from the four Yankee nuclear companies in which New England Power is a stockholder. These are Yankee-Rowe, Connecticut Yankee, Vermont Yankee and Maine Yankee.

11. Q. Do the New England Electric System companies operate this integrated system in isolation from other New England utilities?

A. No, they do not. As the Commission knows, virtually all the New England electric utilities, both investor-owned and of the public power variety — municipals, co-ops, etc. — are members of the New

England power pooling arrangement known as NEPOOL.

NEPOOL as an organization was formalized by the signing of the NEPOOL agreement on September 1, 1971. The agreement provides for the totally coordinated operation of the interconnected bulk power supply system in New England. It also provides for joint planning on a regional basis, to meet future needs.

The NEPOOL agreement was filed with the FPC, now FERC, and was investigated by FPC and subsequently approved, in an adversary proceeding. The objectives of NEPOOL, both near- and long-term, are to enable all the electric utilities in New England, large and small, with or without their own generating capacity, to obtain an equitable share of such benefits as reliable interconnection, economies of scale, emergency protection, long-range planning, and the like.

In 1975, the New Hampshire legislature enacted what is now Chapter 374A of the Revised Statutes, in order to facilitate future participation of New Hampshire utilities in regional scale generation and transmission facilities, both within and outside New Hampshire. Under Chapter 374A, electric utilities in New Hampshire can become part owners of generating and transmission projects in other states and utilities operating in other states can be part owners of projects in New Hampshire. The legislation also authorizes participation in necessary financings, power purchase commitments, etc. Similar legislation has been enacted in Massachusetts, Rhode Island, Connecticut and Maine.

12. Q. Mr. Holden, speaking as an official of New England Power, do you believe that the New Hampshire

Public Utilities Commission should, if it has the power to do so, prohibit or restrict the export by New England Power of hydroelectric power generated by it in New Hampshire?

A. No, I do not. Entirely apart from the issue of the Commission's jurisdiction, to which I have referred, such action would tend to bring about the Balkanization of the utility resources of each of the New England states.

While hydroelectric energy is not vulnerable to the present day rapid escalation of fuel prices, it is severely restricted in New England by predominantly seasonal variations in river flow and in most cases can only be used effectively as a source of peaking power. This is illustrated by the fact that over the calendar year 1978, as shown in the annual report of the New England Power Exchange, or NEPEX, conventional hydroelectric capacity represented 14% of the generating capacity in New England but had only enough river flow to produce 5% of the region's total electric energy requirements.

The development of our six-state regional interconnected system came about, to a large extent, because of the benefits in both improved reliability and reduced costs which all participants realized from interchanging power between the several states. This is of particular importance to areas producing hydroelectric power which can be exported over short periods, for peaking purposes, and for a longer period during the annual spring run-off, but which must import base load energy from thermal stations during many hours of the year. If New Hampshire were to ban the exportation of hydro power, other states might understandably take the

position that they should not permit base load generation within their borders to be transmitted into New Hampshire to meet its needs either for base load capacity or, indeed, when water conditions prevent generating any significant amount of hydro power at all, as is not uncommon during the summer months.

Furthermore, from the standpoint of achieving the most adequate, reliable and economic supplies of electricity throughout New England, the achievements of NEPOOL would be all but lost, as would the benefits of the integrated grid system which links all parts of our six-state region and the central dispatch which makes it operate on the most economic and reliable basis. The New England Electric System companies would have to reappraise and revise their methods of operation and New England Power Company, in particular, would have to revise its wholesale pricing policies as well.

Of course, as a practical matter, flows of power in an interconnected system cannot be controlled. Consequently, short of isolating electric facilities in New Hampshire from those in neighboring states, there is no way physically to prevent power generated at a New England Power hydroelectric station in New Hampshire from being transmitted to a point outside the state.

13. Q. Mr. Holden, from your position as chief executive of Granite State Electric Company, would you view a prohibition or restriction on the exporting of New England Power's New Hampshire hydro generation to points outside the state as potentially beneficial to Granite State?

A. No, I do not believe it would be beneficial. Presently, Granite State purchases all of its requirements for

electricity to supply to its customers from New England Power. The purchase is under a tariff, including rates and terms and conditions of service, which is identical to that used for the sale of primary firm power to other affiliated and non-affiliated customers of New England Power. I do not believe that Granite State's best interests would be served by an attempt to monopolize the hydro portion of New England Power's mix for the benefit of New Hampshire customers.

14. Q. Mr. Holden, do you believe that all the requirements of Granite State's customers could be met from the hydroelectricity which New England Power generates in New Hampshire?

A. I do not believe so, although there would of course be times when it would be more than enough. However, as I commented earlier, availability of hydro power is unpredictable and there would be periods when New England Power's hydrogeneration would be so minimal that it would be far from sufficient to supply Granite State's load. In addition, there is a great disparity in size between New England Power's total hydrogeneration in New Hampshire, both in terms of MW of capacity and kilowatthour production, and Granite State's load and total kilowatthour purchases. New England Power has about 420 MW of capacity in New Hampshire which produces about one billion kilowatthours a year. Granite State's peak load is only about 75 MW and its purchases about 400 million kilowatthours.

15. Q. How would Granite State meet its requirements at times when New England Power's hydrogeneration in New Hampshire was insufficient to meet Granite State's electrical requirements?

A. When the available hydrogeneration was insufficient to meet Granite State's load in any district, the difference between the load in each district and the amount of energy supplied by hydro would have to be furnished under what is usually referred to as a partial requirements contract.

16. Q. If it becomes necessary for Granite State to enter into new power purchase arrangements with New England Power, such as a partial requirements contract, would this new arrangement be subject to FERC's rate jurisdiction?

A. Yes, it would. All of New England Power's sales of electric energy at wholesale for resale, whether the energy comes from hydroelectric generating projects or from fossil fueled or nuclear plants, are subject to the rate jurisdiction of FERC. This would be the case, as I understand it, even if the New Hampshire Commission could lawfully exercise jurisdiction to prohibit or restrict the exportation of some of the company's hydrogeneration.

17. Q. Do you believe that a prohibition or restriction by the New Hampshire Commission on New England Power's hydro generation exports would be of financial benefit to the utilities of the state, or their customers?

A. No, I do not. Assuming for the sake of discussion that the Commission could lawfully impose such a restraint and the company could operate in compliance with it, so far as I am aware it would only affect the physical act of transmitting electric energy. As long as New England Power remains in the business of generating, transmitting and selling electric energy at wholesale for resale in interstate commerce, it will be a "public utility" as defined in Part

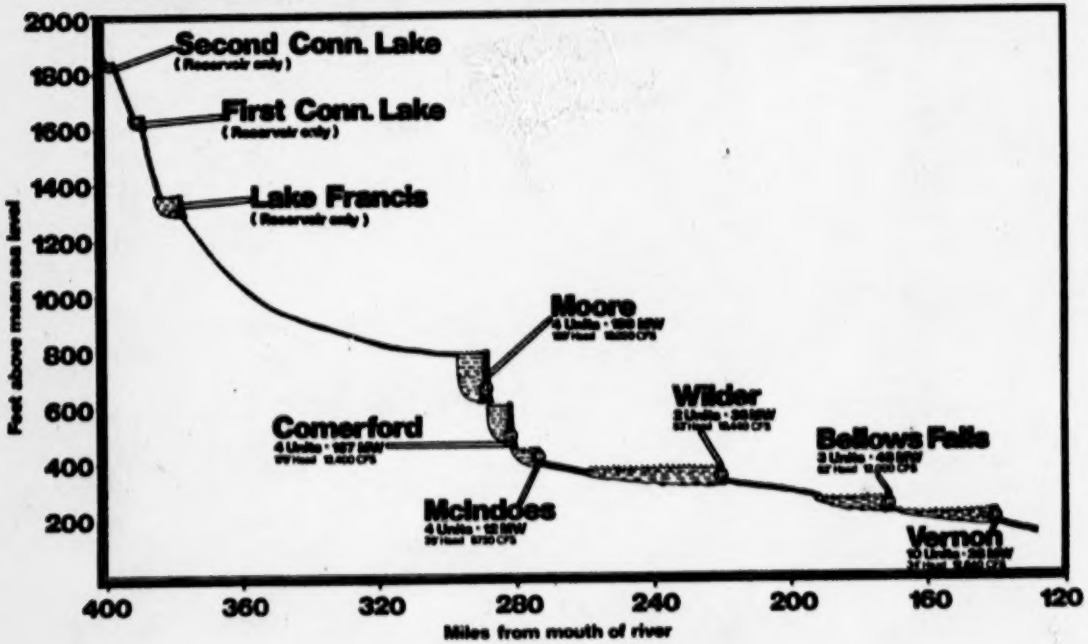
II of the Federal Power Act, and its wholesale rates will be exclusively regulated by FERC.

The Federal Power Act prohibits public utilities from treating any customers preferentially or subjecting others to prejudice or disadvantage. It specifically prohibits any unreasonable differences in rates as between localities or as between classes of service.

FERC — and FPC before it — has consistently required uniform rates for all customers taking similar service under similar conditions, regardless of whether some of them were located near hydroelectric stations, or fossil fuel fired stations, or remote from any power source at all. The rates have always been set on the basis of New England Power's overall costs, not on the source from which the customer receives power.

19. Q. Does this complete your testimony at this time?
A. Yes.

CONNECTICUT RIVER HYDRO



NEP Exhibit 1A.

NEES Hydro

	YEAR BUILT	NO. UNITS	MAN-POWER	HEAD (FT.)	CAPACITY (MW)
CONN. RIVER					
MOORE	1956	4	0	159	199
COMERFORD	1930	4	40	179	167
McINDOES	1931	4	0	29	12
WILDER	1950	2	18	53	36
BELLOWS FALLS	1928	3	18	62	48
VERNON	1909/21	10	24	34	28
DEERFIELD RIVER					
SEARSBURG	1922	1	0	232	5
HARRIMAN	1924	3	35	390	43
SHERMAN	1927	1	0	80	7
NO.5 STATION	1915/74	1	0	182	16
FIFE BROOK	1974	1	0	112	8
NO.4 STATION	1912	3	26	68	6
NO.3 STATION	1912	3	0	68	6
NO.2 STATION	1913	3	0	63	6
TOTAL CONV. HYDRO		43	161		585
BEARSWAMP	1974	2	0	730	602

NEP Exhibit 1B.

NEES Conventional Hydro

Annual Production & Precipitation

NEP Exhibit 1C.

SUMMARY OF NEW ENGLAND POWER COMPANY HYDRO PROJECTS

I. *NEP Hydro Projects On the Connecticut River*

Project	Capacity Located in New Hampshire		Capacity Located in Vermont		Total Project Capacity	
Name	No. Units	Total Capacity	No. Units	Total Capacity	No. Units	Total Capacity
Vernon	8	22.8 MW	2	5.7 MW	10	28.5 MW
Bellows Falls	-	-	3	49.0 MW	3	49.0 MW
Comerford	4	167.0 MW	-	-	4	167.0 MW
McIndoes	4	13.0 MW	-	-	4	13.0 MW
Wilder	1	18.0 MW	1	18.0 MW	2	36.0 MW
Moore	4	199.0 MW	-	-	4	199.0 MW
Conn. River Totals	21	419.8 MW	6	72.7 MW	27	492.5 MW

NEP Exhibit 1E.

Capacity Located in New Hampshire		Capacity Located in Vermont		Capacity Located in Massachusetts		Total NEP Capacity	
No. Units	Total Capacity	No. Units	Total Capacity	No. Units	Total Capacity	No. Units	Total Capacity
21	419.8 MW 35.2%	4	120.7 MW 10.2%	14	649.6 MW 54.6%		1190.1 MW 100%

(2.) PUC: Rhode Island Exhibit No. 1. Prefiled testimony of Edward F. Burke (1-29-80).

I am Edward F. Burke. My business address is 100 Orange Street, Providence, Rhode Island. I am Chairman of the Rhode Island Public Utilities Commission, and I also serve as Chairman of Rhode Island's Energy Coordinating Council.

I am appearing today on behalf of the State of Rhode Island in my capacity as Chairman of the Rhode Island Public Utilities Commission to express the State's views relative to the New Hampshire Public Utilities Commission's investigation relative to whether or not the Commission should prohibit the transmission of hydro-electric power generated by New England Power Company within New Hampshire to points outside the State.

I fully understand this Commission's concern about the rising costs of energy, which have had a major impact upon the life-styles of all Americans with a special impact upon those who live in energy-poor regions such as New England. Of particular concern to any Public Utilities Commission must be the dramatic increase in the cost of oil, which has resulted in sharp increases in the cost of electricity generated by oil-fired units. All Public Utilities Commissions must, therefore, examine alternative forms of electricity generation and ways and means by which generation requirements can be reduced through conservation and load-management techniques.

Today, as I understand it, this Commission will be looking into the possible applicability of RSA 374:35 to the issue of whether or not New Hampshire generated hydro-electric power should be retained within the State's borders. Clearly, the statute cited purports to give such discretion to this Commission. I am aware that the New England Power Company has filed a motion to dismiss which questions the constitutionality of the statute because of its effect on interstate commerce and also because the hydro-electric projects are licensed under certain sections of the Federal Power Act. I am certain that these issues will be carefully presented by competent

counsel and given equally careful consideration by this Commission. Counsel representing the State of Rhode Island will address this matter at an appropriate time.

I wish to point out, however, that RSA 374:35 was enacted by the New Hampshire legislature in a different era. In 1913, the electrical power needs of New Hampshire, Rhode Island and all other states were met principally by small size generating units, which abounded throughout the region. Many of those were hydro-electric facilities. As society grew more complex and as modern technology, industry and domestic consumption required increasingly larger amounts of electricity, more sophisticated methods of generation were developed. There developed not only systems of large scale generating facilities, principally of the fossil-fuel type, but also sophisticated transmission and distribution systems, which led to the development of the present interconnecting network throughout the New England region and other parts of the United States and Canada. This was followed in the 1960's and 1970's by the development of nuclear power plants in various parts of the New England-Northeast region.

The interdependence of one state upon another for electrical generation was brought dramatically to light by the famous blackout of November 1965, which had ripple effects from New York throughout New England and into the Province of Ontario. Subsequently, the Northeast Power Coordinating Council and the region's utilities closely examined the causes and effects of the blackout. The investigation eventually led to the creation in 1971 of the NEPOOL organization, which provides for the totally coordinated operation of interconnected bulk power supply systems in New England. It also provides for a joint effort as far as planning is concerned on a regional basis to meet the future electrical generation needs of New England. It is the purpose of NEPOOL to allow all the electric utilities of New England, both public and private, to

obtain an equitable share of the benefits of reliable interconnection, economies of scale, and system back up in emergencies. This system has worked with great success and, in my opinion, has benefitted the entire region. Essential to the workings of this system has been the premise that power wherever generated may be dispatched within the region instantaneously as the need arises on the grid system with appropriate credits and debits being made relative to the costs of generation to the customer receiving the electricity.

In support of the NEPOOL concept, the New England states have worked closely with electric utilities to develop emergency conservation and load shedding plans to reduce the impact on society of shortfalls in supplies of fuel necessary for energy generation.

In the last several years, the New England Governors through the New England Regional Commission and the New England Conference of Public Utilities Commissioners Inc. have been exploring ways and means of bringing to the New England region, at a reasonable price, substantial amounts of hydro-electric power from Quebec, and hopefully from other regions of Eastern Canada. In fact, at their June 1979 meeting, the Eastern Canadian Premiers and the New England Governors instructed the Northeast International Committee on Energy, including New Hampshire's representative, the distinguished Professor John Carroll of the University of New Hampshire, to examine ways and means of developing increased electricity exchanges between New England and the Eastern Canadian region.

At that meeting, the Governors and Premiers adopted a unanimous resolution supporting the development of hydro-electric projects in Quebec, Newfoundland and the Bay of Fundy and pledged to maintain close liaison ". . . in the regional opportunities presented by these projects." At the urging of the New England Public Utilities Commissions, in-

cluding that of New Hampshire, NEPOOL has formed a special committee which has opened discussions with Hydro-Quebec relative to the possible purchase of electric power from that entity.

Last November, discussions were commenced between the Power authority of the State of New York and Hydro-Quebec with Vermont sitting in for the New England states on ways and means of developing improved transmission capability between Hydro-Quebec, New York and the New England states. There are also ongoing discussions between a number of New England states New York, New Jersey and Pennsylvania relative to the possible energy development opportunities that could be assisted by the creation of an Energy Corporation of the Northeast, more commonly known as ENCONO. One of the opportunities being explored is ways and means of developing and financing a system for the transmission of hydro-electric power from Canada.

We are living in an exciting age in which New England, Northeast Regional and Canadian-American cooperation on energy matters is gaining substantial momentum. New Hampshire, through its very able and distinguished Governor Hugh Gallen has been in the forefront of this movement. The ultimate goal of this effort is to provide reliable supplies of energy to the region at the lowest possible cost. There are examples outside of the electrical energy field which I am sure are well known to all of you. The regional initiatives of the New England governmental agencies have been based on a clear recognition of the interdependence of the New England states relative to electrical energy, an interdependence which is clearly reflected in the complex NEPOOL system. This system makes it possible for Rhode Island's Narragansett Electric Company to receive 6% of its purchased energy from hydro-units located in the State of New Hampshire. The withholding of significant amounts of electric power from the NEPOOL

system by any member utility or by any state action would, in my opinion, constitute a retreat from the many advances which I have described and would disrupt the workings of this finely tuned and highly efficient system. The effects of such action are very capably described in the prefiled testimony of Russell A. Holden, the Vice President of New England Power Company.

Thank you for affording me this opportunity to present these views.

(3.) PUC: NEP Exhibit No. 2. Prefiled testimony of Robert O. Bigelow (6-25-80).

1. Q. Will you please state your full name and business address?
   A. My name is Robert O. Bigelow. My business address is 25 Research Drive, Westborough, Massachusetts 01581.
2. Q. By whom are you employed and in what capacity?
   A. I am Vice President and Director of Planning and Power Supply of New England Power Service Company, which supplies many services, including professional engineering services, for companies in the New England Electric System. I am also a Vice President of New England Power Company.
3. Q. In filing this testimony, does New England Power Company waive its objection to the jurisdiction of the New Hampshire Public Utilities Commission over the company's exportation of hydroelectricity generated in New Hampshire?
   A. No, New England Power Company does not waive that objection.
4. Q. Would you describe your educational and professional background, please?
   A. I received my Bachelor of Science and Master of Science degrees from Massachusetts Institute of Technology in 1950 and joined the New England Electric System in that year. Since 1951, I have been active in the field of power system planning and computer applications. Also, I was engaged for two years in plant design and construction, and spent one year on loan to Mitre Corporation in the Computer Programming Division. From 1960 to 1968, I was in charge of the Engineering Studies Department of NEES, supervising System Planning Studies and Engineering Application of Computers. On January 1, 1969, I was appointed Chief Electrical Engineer of

NEES. On November 1, 1969, I was appointed Assistant Chief Engineer with responsibility for all system planning activities. On June 1, 1973, I was appointed Director of Planning and Power Supply. In 1977, I was elected a Vice President of New England Power Service Company, and in 1979 I was elected a Vice President of New England Power Company. I am a Registered Professional Engineer in the Commonwealth of Massachusetts and a Fellow of the Institute of Electrical and Electronics Engineers (IEEE). I have been a member of the NEPOOL Planning Committee since its inception in 1968. I served as Vice Chairman of that committee during 1971 and 1972, and as Chairman during 1973 and 1974. I have also served on various committees of the Northeast Power Coordinating Council, and am a member of the System Planning Committee of the Edison Electric Institute.

5. Q. What is the subject matter of your testimony?
   A. I will describe the objectives and functions of the New England Power Pool (NEPOOL) and in particular, the operation of hydroelectric generating facilities under NEPOOL dispatch. The hydro facilities owned by New England Power Company are operated under NEPOOL dispatch.
6. Q. Mr. Bigelow, would you please describe NEPOOL?
   A. NEPOOL consists of some 60 utilities in the six-state New England region and comprises something over 98% of the generating capacity and essentially all of the transmission network required to meet the needs of New England's electric customers. Included in those 60 utilities which are parties to the NEPOOL Agreement are the nine major investor-owned utilities in New England; three small investor-owned

utilities and a substantial number of municipals and co-ops. For convenience, I have attached to this testimony as Appendix 1 a map showing the locations of the principal generating stations and the high-voltage transmission network, and am supplying as Appendix 2 a copy of the NEPOOL Agreement.

The objectives of NEPOOL are described in Section 4.1 of the Agreement as follows:

"The objectives of NEPOOL are, through joint planning, central dispatching, cooperation in environmental matters and coordinated construction, operation and maintenance of electric generation and transmission facilities owned or controlled by the Participants and through the provision of a means for more effective coordination with other power pools and utilities situated in the United States and Canada,

(a) to assure that the bulk power supply of New England and any adjoining areas served by Participants conforms to proper standards of reliability, and

(b) to attain maximum practicable economy consistent with such proper standards of reliability, in such bulk power supply and to provide for equitable sharing of the resulting benefits and costs."

7. Q. How does NEPOOL implement these objectives?

A. Implementation of NEPOOL's objectives is carried out through three principal functions:

(1) Planning of the bulk generation and transmission as one integrated system;

(2) Operation of the bulk generation and transmission as one integrated system, which is accomplished through the NEPEX Dispatch Center and its four satellite dispatch centers; and

(3) Allocation of costs and savings resulting from pool operation on an equitable basis among the Participants.

8. Q. What are the benefits which accrue to utilities as members of NEPOOL?

A. Benefits which come from NEPOOL membership generally fall into two categories.

The first is an enhancement of reliability. The reserve generating capacity and transmission capability of all Pool members is available as backup to each Pool member during periods of difficulty on its system. This requires strong transmission interconnections and coordinated operation, which combine to make a substantial contribution to the reliability of all Participants.

The second is an economic benefit. As Pool members, Participants share in the economies of scale, which are made possible by:

(a) Large units planned and developed jointly by several Pool members under Pool coordination;

(b) Pool dispatch, which operates the system on a regional basis and permits these large units to be utilized effectively, and the overall system to be operated at minimum cost.

(c) Reserve sharing, whereby each company's individual reserve requirement is substantially less than it would be operating in isolation, because all the reserves throughout the Pool are shared;

(d) Access to a strong interconnected transmission network which permits backup for the loss of large units; and

(e) Access to all generating units which are installed in New England and the ability to purchase shares in them.

In addition, through the various NEPOOL committees, the expertise of all companies can be brought to bear on regional problems and help individual utilities develop their systems in the context of an overall Pool operation. In short, the Pool concept and its operating and planning functions are what make a large modern power system practical here in New England.

9. Q. What are the obligations which member utilities incur when they join the Pool?

A. There are four primary responsibilities which each Participant incurs:

1. *Capability Responsibility*

Each Participant must provide sufficient generation on its system, or outside its system but interconnected with the network, to meet its peak demand plus an allocated share of the Pool reserve. This is a reliability responsibility, i.e., to have sufficient capacity to meet peak requirements and maintain Pool reliability.

2. *Transmission*

Each Participant must provide its share of the transmission facilities which are needed to make the Pool work. It needs to be emphasized that transmission is the "glue" which holds the whole NEPOOL system together from a physical point of view.

3. *Poolwide Dispatch*

Each Participant must submit its bulk generation and transmission facilities to control by the NEPOOL dispatch center (NEPEX). This means that NEPEX calls the shots on how each Participant's system will be operated in order to coordinate all facilities, and to maintain overall system reliability and maximum economy of operation.

4. *First Options within the Pool*

All Participants in NEPOOL have essentially agreed to provide first option within NEPOOL on all purchases and sales of capacity and energy before consummating any such transactions with utilities outside NEPOOL.

10. Q. Specifically referring to the economic benefits of Pool dispatch, please explain how this is achieved.

A. Under Pool dispatch, all generating facilities throughout the six-state region are placed under the control of the NEPEX Dispatch Center. The computer system at NEPEX calculates the cost of generating throughout the region and assigns to each individual unit in New England its operating schedule in order to minimize the cost of the region's total supply. This means taking into account the different prices of fuel throughout the region, the different efficiencies of the various units and the fact that pumped storage and conventional hydro are limited energy sources and that the value of the energy in the various rivers and reservoirs can be maximized by scheduling these units when they will displace the most expensive energy which would otherwise have to be used anywhere in the region. It means that the units are operated regardless of company ownership or geography and the transmission

capability of the Pool allows power to flow in such a way that the total overall costs to the Pool are minimized.

11. Q. What magnitude of savings is achieved as a result of this Pool dispatch?

A. Savings have been very substantial over the years. In 1979, for example, the savings achieved by NEPOOL dispatch have been reported at somewhat over 44 million dollars. This is the savings in operating costs, primarily fuel, achieved with the systems operating under NEPOOL dispatch, as compared to how they would have been operated if each individual company had simply run its own generation to minimize the costs on an individual system basis.

12. Q. Would a limitation on hydro generation in a particular state have an impact on those savings?

A. I believe so. The best use of hydro is to schedule it so that its limited energy is used to displace the most expensive fuel on the system that it can. During certain periods of the year, when there is substantial flow in the rivers, hydro generation may well be exported and scheduled on a basis to displace generation anywhere in New England. Its value essentially is determined by the most expensive fuel that would otherwise be burned throughout the six-state region. At other times of the year, however, when water levels are low, there may well be economic steam generation in other regions of New England which would be imported into the areas where hydro facilities are located, permitting the local utility to back down its most expensive generation. It is a two-way street and its value is maximized when it is operated that way.

13. Q. Aside from the mechanics of central economic dispatch, is it physically possible to limit or prohibit the export of hydro power from a state in which it is generated?

A. Obviously, the answer to the question is yes, if you are willing to open all the transmission ties from that state to the rest of the region. This would clearly deprive that state of the benefits which can be achieved through Pool membership and interconnected operations with other utilities.

A second possibility would be to operate the system in such a way that net power was always imported when hydro generation was running. This would, again, deprive that state of the benefits of operating in a Pool system, because it could not have its generation operating under central dispatch for the benefit of the region as a whole.

To summarize, it is impossible to identify specific kilowatthours as coming from one source or another, once they are in the grid system. If any power is exported outside the network of a specific state, there is no way of establishing whether it comes from hydro, oil, nuclear, coal or whatever sources are generating at the time.

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(4.) PUC: PUC Staff Exhibit No. 9. Prefiled testimony of Lisa Gertler, as amended by PUC Staff Exhibit No. 10, without schedules (6-25-80).

Q. Please state your name, business address and occupation.

A. My name is Lisa Gertler and my business address is 8 Old Suncook Road, Concord, New Hampshire 03301. I am an economist with the State of New Hampshire, Public Utilities Commission.

Q. Would you please indicate your formal education and professional experience.

A. Yes. I graduated in December of 1978 with a Baccalaureate degree from Brandeis University with a major in economics. I joined the staff of the New Hampshire Public Utilities Commission in June of 1979 as a Public Utilities Examiner. In that capacity, I authored testimony regarding the conversion to coal of Public Service Company of New Hampshire's Schiller Station. I assumed my current position as economist in March, 1980. My most recent case filing has been in Docket No. DE 79-208 concerning the rates to be paid to small power producers and cogenerators under state law and the Public Utility Regulatory Policies Act. My responsibilities include analysis of ratemaking issues and implementation of the Public Utility Regulatory Policies Act of 1978.

Q. What is the purpose of your testimony?

A. The purpose of my testimony is to provide an economic analysis of the effect of limiting the exportation of hydropower from hydroelectric facilities owned and operated by New England Power Company within the State of New Hampshire.

Q. Which facilities are these?

A. The hydroelectric stations, or portions thereof which are located within the State are all on the Connecticut River. They are the Moore, Comerford and McIndoes dams, otherwise known as Fifteen Mile Falls, one-half of the

Wilder station, which generates electricity from two equal-sized units, and four-fifths of the Vernon station, which generates power from ten equal-sized units.

Q. What is the capacity and output of these units?

A. The maximum capability, or nameplate rating of these facilities is 328 (rounded) megawatts (MW). The output of the dams based upon a six-year average is 945,059 MWH (Schedule I).

Q. How could it be arranged that the power generated from these dams be restricted to benefit New Hampshire electric customers?

A. As with most sales from a specific generating station a unit power contract could be established between New England Power Company (NEPCO) and one or more New Hampshire electric utilities. Unit power sales are not handled for billing purposes through the New England Power Exchange (NEPEX) and so would not affect the economic dispatch system in terms of payment for the power. The hydroelectric power should, for equity purposes, be sold at its economic cost.

Q. What is economic cost?

A. Economic cost would include all costs associated with the dams and their operation including but not limited to depreciation, return on invested capital, operation and maintenance (O&M), and the allocated cost of water storage. Economic cost would not be, for instance, the value of power which is displaced by a purchase of hydroelectric power (decremental cost). An estimate of the economic cost of the hydro units located in New Hampshire on the Connecticut River, excluding the costs of water for power, is detailed on Schedule II.

Q. Would a substantial amount of power currently generated by oil in New Hampshire be displaced by this hydropower?

A. Yes. The ability to allocate the benefits of low-cost hydroelectric power to New Hampshire through billing mechanisms has not been disputed thus far in this docket. The allocation of the hydropower to New Hampshire would mean that, beginning with the most expensive generation, oil-fired electricity may be displaced by hydroelectricity. Public Service Company of New Hampshire (PSNH) maintains much more than 328 MW of oil-fired peaking generation, from which it generates power at far above its average marginal cost*.

Q. Will the cost of generating electricity be higher for NEPCO if the export of hydroelectric power is restricted?

A. Yes. Average cost will increase by a small percentage over what it might otherwise have been.

Q. Would PSNH's costs go down if it were to have access to the sum of all the energy produced by the hydro facilities?

A. Yes. The average cost of power to PSNH would drop substantially. The analysis herein was conducted to measure the magnitude of this change in the cost of service of both PSNH and NEPCO under the following conditions:

1) Export of hydropower from New Hampshire is prohibited.

2) All the power from the New Hampshire portion of the Connecticut River dams is sold to PSNH.

3) The change in allocation affects only fuel costs which are passed onto consumers on a constant KWH basis; that is there is no difference in fuel costs per unit among rate classifications although the contribution of fuel costs to total unit cost by rate class may differ. This includes the re-allocation of the economic cost of the hydro plants.

* See Docket No. DE 79-208 (Small Power Producers and Cogenerators) Testimony of Martin Ringo

Q. Is the total benefit (decreased system cost) realized by customers of PSNH the same as the total disbenefit (increased system cost) incurred by NEPCO customers?

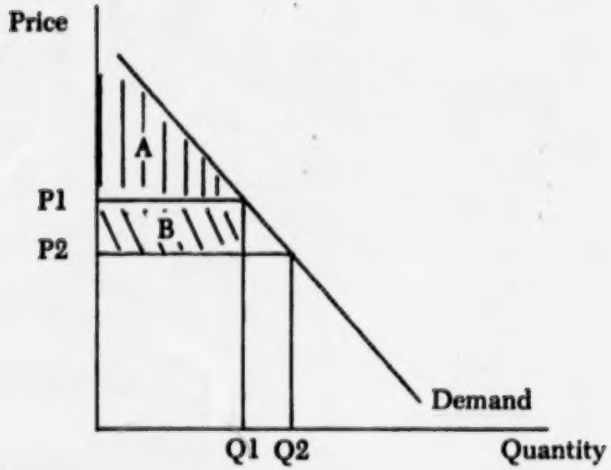
A. The reallocation of resources results in a decrease in total systems cost (PSNH and NEPCO) as a result of the greater utilization of NEPCO's existing low-cost (incrementally) excess capacity (i.e. the Bear Swamp Pumped Storage Plant). The Bear Swamp plant has not historically been fully utilized (see Schedule III). Without massive system-dispatch simulation, utilizing judgment, it is logical that the Bear Swamp plant would represent the "filler" should the export of hydropower from New Hampshire be prohibited. Further, the reallocation of the State of New Hampshire hydropower to the State of New Hampshire increases consumer welfare. The change in welfare is realized by consumers through the change in aggregate system(s) price; although the NEPCO system average price increases by a miniscule amount the PSNH system price decreases dramatically. Consumer welfare is typically measured by economists through the device of consumer surplus.

Q. What is consumer surplus?

A. Consumer surplus usually refers to the area to the left of an individual consumer's demand curve about the market cost of the good where

$$\text{Demand} = f(\text{Price})$$

For the purpose of this discussion price will equal average revenue per KWH by customer class. This area is also known as the sum of all the "reservation prices". A simple definition of the concept of consumer surplus should also state that the following holds true, in theory:



1) If area A is the amount of consumer surplus at price P1 and
2) Price were to decrease to P2 then
3) Consumer surplus would then include area A and area B.

The centerpiece of welfare analysis utilizing consumer surplus indicates that given a consumer's price* elasticity of demand a change in price will change the amount of consumer surplus. An increase in consumer surplus is an increase in consumer welfare. A decrease in consumer surplus is indicative of harm to consumers' welfare. The amount of consumer surplus can be variously interpreted as the amount of additional income the consumer would have been willing to spend on the good, at lower levels of

*Ratio of the percentage change in quantity demanded which is associated with a percentage change in price.

consumption in the case of a normal good, or inversely, an indication of the amount of income the consumer need not spend on the good to have it. If a budget constraint is introduced into the model, even further results may be obtained*.

Q. How does the concept of consumer surplus relate to the export of hydroelectric power from New Hampshire?

A. Economic criteria which evaluate policy actions on the basis of changes in the welfare of individual consumers are relevant to this discussion. Consumer surplus is a tool to measure changes in welfare of individual consumers or groups of consumers where the demand function is specified. Problems in economic analysis could arise when a policy change results in a redistribution of value between two consumers where the value cannot be quantified. For instance, if a theatre were to cancel a show and replace it with another, season subscribers X and Y would experience changes in the value of their tickets relating to their personal utility for the original and the new show. But because the subscribers had already purchased the product (season tickets) changes in quantity demanded, the result of personal utility functions and budget constraints, could not be observed empirically, even though the demand curve may have shifted. However, in the case of the production input of hydroelectric power, the ultimate consumer is blind to the input, but aware only of the price constraint, in a single-variable demand curve. The consumer can then change the quantity demanded (move along the demand curve). These changes can be measured historically and predicted empirically to quantify, in

*See Willig, R.D. "Consumer's Surplus Without Apology" *American Economic Review* Vol. 66 No. 4 September 1976. Additionally see the Technical Appendix.

dollars, the change in welfare due to a price change. Summed over all consumers affected the net effect may be observed. A budget constraint, introducing the element of relative income levels by state may be considered useful but has not been included in the analysis herein due to the difficulty of applying aggregated data. However, to guage the possibilities, the income levels by state are displayed on Schedule IV.

Q. How does an analysis of the change in consumer surplus assist in deciding the policy issue regarding the export of hydroelectric power?

A. The analysis of consumer welfare can determine whether a policy action would result in a net benefit to the sum of all consumers affected, whether positively or negatively by a policy change. Summed over all consumers, the net benefits or costs can be estimated in dollars.

Q. Doesn't the power-pooling system, where generating units are dispatched region-wide in order of their marginal cost provide that the benefits of the hydropower are already allocated to New Hampshire consumers?

A. The existence of power-pooling does not imply that the costs of supplying power to each state included in the pool are based upon that state's natural or other resources. Moreover, no analysis exists within the four corners of the Commission which purports to show that power-pooling allocates natural resources fairly, equitably or optimally, however these terms are defined.

Q. Would discontinuance of the export of hydroelectric power from New Hampshire pose a burden upon the stockholders of NEPCO?

A. In theory, the stockholders would remain indifferent to the reallocation of the hydropower unless the change in the generating mix of the utility were viewed by investors as changing the risk associated with holding the utility's

stock. If the regulatory agency captures the risks of common equity in the ratemaking process those stockholders will be paid the incremental change in risk premium as demanded in the marketplace for common stocks.

Q. Could you describe the two companies and their respective territories?

New England Power Company (NEPCO) is the wholesale and primary generating subsidiary of New England Electric System (NEES), a holding company. It is the major supplier of power to the three retail subsidiaries of NEES-Narragansett Electric Company, (NEC), Massachusetts Electric Company. (MEC) and Granite State Electric Company (GSE). The first company, (NEC) has some of its own steam generating capacity plus peaking generators. NEPCO makes some retail sales of its own. Sales to GSE constitute about 6.45% of all electric sales in New Hampshire (See Schedule V, Page 1 of 2) and about 3% of sales by the three retail subsidiaries of NEES (Schedule V, Page 2 of 2). NEES, through retail and wholesale sales has operated at times in five New England states in recent years. Most of their business however, as shown in accompanying schedules is derived from Massachusetts and Rhode Island.

Public Service Company of New Hampshire is both a retail and wholesaling electric company with 97% of its KWH sales made in New Hampshire. (See Schedule VI). For the purpose of analysis, only NEPCO (or NEES) will be analyzed in so far as the three sister subsidiaries make retail sales, (NEPCO sales for resale to affiliated companies are therefore ignored) and NEPCO (or NEES) will be treated as making sales to Massachusetts and Rhode Island only. Public Service Company will be treated as though all of its sales were made in New Hampshire unless otherwise noted and as if it were the only retail electric company in New Hampshire.

The distortions that may ensue are due to these limitations. The customer makeup for PSNH is slightly different than that of the State's electric utilities as a whole (see Schedule VII) and the cost changes affecting NEPCO will be less if part of the hydropower is allocated to GSE.

Q. Is there a market for the hydropower from the Connecticut River dams in New Hampshire?

A. Yes, there is, Schedule VIII details the generation mix of PSNH and NEPCO. As can readily be perceived, PSNH is heavily dependent upon oil generated electricity. This power is the most expensive to generate and if it is replaced by hydropower the result is to reduce fuel costs associated with electricity consumed in New Hampshire. NEPCO is also dependent upon oil-fired power, even with the conversion of Brayton Point Units 1 and 2 to coal. However, NEPCO's cost of service remains below that of PSNH (Schedule IX) and the rate of growth in its average system cost should slow once the Brayton Point conversion has been effected. NEPCO's cost of fuel remains below that of PSNH (Schedule X). Additionally, PSNH is experiencing greater growth in both sales and peak load than NEES, which will further widen the differential in fuel costs as PSNH requires more higher priced fuel to meet the increasing peak load (Schedule XI).

Q. How is the change in consumer surplus measured?

A. The change in costs to the two utilities involved is measured thusly:

(1) Determine the aggregate and per unit decremental (incremental) cost avoided (replaced) for each utility due to reallocation of the hydro resource.

(2) Determine the original consumption by class.

(3) Determine the incidence of the change in costs by customer class for each utility

(4) Determine the long-run change in quantity demanded by customer class for each utility.

(5) Determine the net change in total cost of service for each utility.

(6) Utilize (1), (2), (3), (4) to determine the change in consumer class for each utility according to the formula in the Technical Appendix.

(7) Compare (5) to (6) aggregated as a check. They should be equal with opposite signs.

In order to utilize the most up-to-date fuel cost data and more accurately reflect the tremendous changes in fuel costs evident in recent months, the latest available fuel cost data (Schedule X) was combined with an estimation of the fixed cost per KWH. The latter (Schedule XII, page 1 of 2), was based upon 1978 data and is useful for expository purposes. It is not meant however, to be a fully accurate representation of unit fixed cost. The estimated cost per KWH for each utility is shown on Schedule XII, page 2 of 2.

Utilizing avoided cost data for PSNH (Schedule XIII) and the cost of generation at Bear Swamp (Schedule XIV) the replacement (or displacement) cost of the hydroelectric units was calculated (Schedule XV). Using the consumption figures given on Schedule XVI and the incidence of the change in prices (Schedule XVI pages 2 and 3 of 3), the change in consumption was calculated, using the formula in the Technical Appendix. The results, in terms of cost of service by company, by class, in the aggregate and on a per unit basis, are on Schedules XVII and XVIII.

The final results show a net change in consumer surplus, (which may be interpreted as a net increase in income to customers) of $15.3 million per year, utilizing the most

current fuel data. Increased fossil fuel prices would make this figure grow. Of course this "net" figure is unevenly distributed by region and by class as Schedule XVIII, page 1 of 2 shows, given the assumptions used. However, the positive impact upon New Hampshire (PSNH) customers is almost ten times as large as the negative impact upon Massachusetts and Rhode Island (NEES) customers, on a per unit basis.

Q. Are there any circumstances under which this result could not be obtained?

A. Yes. The use of Bear Swamp in the previous equations is a function of the assumption that NEES is a cost minimizer and profit maximizer; that is, the Company would use its least expensive generating source with load characteristics similar to the hydro; as is available. The low annual capacity factors at Bear Swamp, historically, indicate availability unless power for pumping off-peak is unobtainable. Bear Swamp would appear to be the logical replacement for the hydro. However, if the assumption of cash-flow maximization is used instead of profit maximization, the hydro might be replaced by oil-fired power by NEES, in which case, it is likely that summed over all customers affected, consumer surplus would not change by very much.

Q. If there were to be no change in consumer surplus, has no one benefited and no one been injured?

A. Not necessarily. No net change in consumer surplus means that, in the aggregate the reshuffling of costs from one group of customers to the other has cancelled itself out. On a state by state basis, however, it is not likely that if the export of hydropower were restricted, the cost of electricity in New Hampshire would not be lower than it would otherwise have been, given no dramatic change in technology. In addition, because of the difference in the

size of the customer base, the price changes to individual customers would be more dramatic on the down side in New Hampshire than on the up side in Massachusetts and Rhode Island. The net change in consumer surplus though, tells us whether the whole region benefits by the change, as it does under the previously tested set of conditions.

Q. Are you making any recommendations based upon your analysis?

A. No. The analysis has been done to shed some light upon the economic possibilities given a change in policy regarding the export of hydropower. The Commission may want to consider this analysis in view of the statutory references to hydroelectric power regarding whether:

> ". . . such electrical energy or the portion thereof . . . is reasonably required for use within this state and that the public good requires that it be delivered for such use."(1)

or

> "as to the existence of an available market at fair rates within the state . . ."(2)

Q. Does that conclude your testimony?

A. Yes, it does.

(1) NH RSA 374:35
(2) NH RSA 374:36

(5.) PUC: Statement of George R. Gantz (7-8-80).

Honorable Commissioners, thank you for recognizing me and allowing me to make the following statement.

There is a great deal of misunderstanding concerning the modern electric utility system and the issue of Connecticut River Hydroelectric Power, and we would like, in this statement today, to clarify what these issues really mean.

RSA 374:35 was written long before the modern electric utility system, based as it is on extensive interconnection and power pooling arrangements, had developed. Nevertheless, the basic intent of the law remains the same. The legislature clearly identified hydroelectric power as an indigenous resource, the benefits of which should be available to the people of this state. We feel that the basic intent of this law is what should guide the PUC in its deliberations. According to RSA 374:35, it is incumbent upon the PUC to determine whether or not "such electrical energy . . . is reasonably required for use within this state and that the public good requires that it be delivered for such use." Given the intent of the law, this instruction means that the PUC must determine not just where the power is going, but, more importantly, where the benefits of that power are going.

Let me explain the significance of this interpretation by describing what actually happens to Connecticut River hydroelectricity in the modern electric power grid we have in New England. All the power plants in New England are dispatched by the New England Power Exchange, that is, one central agency determines when each plant is turned on and when it is turned off. The same is true of the Connecticut River hydroplants — they are owned by New England Power Company, but dispatched by NEPEX. The power plants are dispatched in accordance with the cost of fuel in order to meet the system-wide demand for power. The cheapest running plants are dispatched first, and the more expensive operating plants, such as the oil-fired plants, are dispatched only when

the system-wide demand for power is so great that there are no other cheaper sources with which to meet the demand. Hydro is a unique source of electricity, not only because the fuel is free and its operating costs are so low, but also because it is extremely flexible and can be adjusted to meet rapidly changing power demands. This ability to follow changes in the load is utilized extensively in New England throughout the day, and substantially increases the reliability of the whole utility system.

Let's suppose that an increased demand for power occurs in New Hampshire, in Public Service Company territory; further suppose that NEPEX decides to dispatch a Connecticut hydro unit to meet the load, because that is the cheapest unit available. The flow of power goes from the hydro site to consumers in New Hampshire. However, the situation is not that simple — we have to ask how the accounting is handled. New England Power is generating electricity for Public Service Company customers.

What happens is this: NEPEX calculates on a computer model what it would have cost Public Service Company to generate the power needed to meet its own customer demand. Suppose the next unit available in New Hampshire would have been the Newington Oil-Fired Station, and that the fuel cost at Newington were 6 cents per Kwhr. For the increased demand in PSNH territory that we hypothesized, NEPOOL would then charge PSNH 6 cents for every Kwhr. Meanwhile, New England Power was generating power to meet the load in PSNH territory, and was experiencing incremental costs of, say, 4 cents for every Kwhr generated. The difference between what NEPEX charges and what it pays is what funds the New England Power Pool.

But the consequence is this: even when New Hampshire consumers are receiving power from hydro-electric stations in New Hampshire, they must pay a rate as if the power were

being generated by a more expensive plant. This fact is based upon the agreement establishing the New England Power Pool and on the fact that the facilities are owned by a Company whose major load centers are not located in New Hampshire.

New Hampshire consumers do receive substantial benefits from the arrangement creating the New England Power Pool and from the increased reliability of the system resulting from the Connecticut hydro plants. They also receive tax and other benefits from the facilities. However, New Hampshire consumers are not receiving the benefits of lower cost hydroelectric power, even on those occasions when they actually receive their electricity from those facilities. The Governor's Council on Energy urges the Public Utilities Commission to consider these facts in its deliberations under DE 79-223. We think the intent of RSA 374:35 is clear, and that the burden of proof rests with New England Power Company to show that the existing arrangements are in the best interest of the New Hampshire consumer. Without such proof, we urge the Commission to take such action as may be necessary to assure that the New Hampshire hydro resources benefit New Hampshire consumers.

(6.) PUC: NEP Exhibit No. 7. Prefiled rebuttal testimony of Robert O. Bigelow (7-29-80).

Q. Please state your full name and business address?

A. My name is Robert O. Bigelow. My business address is 25 Research Drive, Westborough, Massachusetts 01581.

Q. By whom are you employed and in what capacity?

A. I am Vice President and Director of Planning and Power Supply of New England Power Service Company, which supplies many services, including professional engineering services, for companies in the New England Electric System. I am also a Vice President of New England Power Company.

Q. Have you previously testified in this proceeding?

A. Yes, and my qualifications are contained in that earlier testimony.

Q. What is the purpose of your testimony?

A. It is to present my opinion of certain assumptions contained in, and the conclusion of, a staff economic analysis. That analysis attempted to show the effect of limiting the exportation of New Hampshire hydropower owned by New England Power Company ("NEP").

Q. Please explain how the New Hampshire hydro units are dispatched in the NEPOOL System?

A. Dispatch of NEPOOL generation is performed by NEPEX. By a sophisticated on-line computer system and consistent with reliability requirements, NEPEX dispatches available generation on an optimal economic basis. "Economic" means more than just consideration of fuel costs. The dispatcher considers all factors that affect the total cost of generating electricity, looking at both daily and weekly load cycles. This is particularly important in the case of hydro generation, which is a limited energy resource. There is only so much water available for the day or week, and the dispatcher must schedule it to achieve the greatest economic benefit.

The Connecticut River hydro units, which include the New Hampshire units that are the subject of this hearing, are scheduled on a weekly basis to maximize the benefits of their limited energy subject to various constraints in required river flows. This is done by dispatching the hydro units to displace the most expensive thermal generation in the Pool, which would otherwise be run during the week.

These hydro units may be treated as peaking, intermediate, or base load units depending upon the river flow for that particular week. The large storage units at Fifteen-mile Falls, which include 379 MW in New Hampshire, operate at a capacity factor in the 20%-30% range and are almost always used for peaking purposes. The other plants farther down the river have little storage and operate as run-of-river units, usually on a daily cycle. Their New Hampshire capacity is approximately 40 MW, and they are typically used for intermediate type operation.

Q. When the New Hampshire hydro units are dispatched by NEPOOL, can it be determined which customers they are serving?

A. No. The NEPOOL dispatch of all New England generators serves all of the customers in New England. There is no way of knowing which generator serves which load. Thus, it cannot be stated which customers are served by the New Hampshire hydro units.

Q. Please explain how pumped storage generation, such as Bear Swamp, is dispatched on the NEPOOL system?

A. Bear Swamp generation serves as peaking capacity in the NEPOOL dispatch. Water is pumped from the lower reservoir to the upper reservoir generally at night and on the weekends when the cost to run thermal generation for pumping is low. The thermal generation used for pumping is the least expensive generation on an incremental

basis which is not already used to serve the load. The water in the upper reservoir is used to generate electricity generally during the weekday peaks when the marginal cost of thermal generation is high. NEPOOL operates the pumps whenever the thermal generation pumping cost times 1.41 is less than the incremental cost expected for thermal generation which would be replaced by running Bear Swamp generation.

Q. Earlier testimony has suggested that the Bear Swamp plant is underused from an economic standpoint. Do you believe this is true?

A. No, I do not. Bear Swamp is scheduled by NEPEX to operate when an economic benefit can be achieved. During many days in the year, there is little or no generation available at night which can pump power at a pump storage cost which will provide economic generation the following day. On such days, units still serve on a standby basis as fast-action reserve, but are not used for economic peaking. If it were economic to do additional pumping, NEPEX would do it as normal dispatch.

Q. Testimony has been presented in this case in which an economic analysis was based on the assumption that nuclear generation is available to provide pumping power for Bear Swamp. Is this a realistic assumption?

A. No.

Q. Please explain.

A. NEPOOL now has approximately 4300 MW of nuclear generating capability when all nuclear units are available and on line. The typical daily minimum load on the NEPOOL system runs in excess of 6000 MW. Even on the lowest hour of the year, which typically occurred this year over the Memorial Day weekend, the minimum NEPOOL load was 4852 MW.

While NEPOOL is the proper entity to consider, it may be noted that NEP has 384 megawatts of nuclear entitlements, while the bottom of its load curve is approximately 900 megawatts. Nuclear generation is the lowest cost thermal energy available and is therefore dispatched first. Thus, even during off-peak hours when pumping takes place, all nuclear generation available is required for load and pumping must be done with fossil thermal units.

Q. Considering planned maintenance and all other operating considerations, does NEPOOL have nuclear capacity available for pumping Bear Swamp?

A. NEPOOL does not have nuclear power available for pumping Bear Swamp.

Q. Will NEPOOL be able to pump Bear Swamp with nuclear power in the foreseeable future?

A. No.

Q. Assuming this Commission has the authority to direct NEP to enter a contract with the Public Service Company of New Hampshire ("PSNH") which transferred NEP's New Hampshire hydro units to PSNH, would NEPOOL dispatch change as a result of such a contract?

A. No. NEPOOL dispatches all New England units without consideration of financial support of the units. Thus, a change in financial support as the result of a unit contract would not change the NEPOOL actual dispatch at all. There would be no change in operation of Bear Swamp as the result of a unit contract sale of New Hampshire hydro from NEP to PSNH.

Q. If the initiation of a unit contract would not change the actual NEPOOL dispatch, then how does a unit contract affect the member companies of NEPOOL?

A. Unit contracts affect the billing between NEPOOL and each of the member companies. Such contracts, I understand, must be approved by the Federal Energy Regulatory Commission.

Q. Specifically, how would a unit contract sale of New Hampshire hydro from NEP to PSNH effect the member companies of NEPOOL?

A. A unit contract sale of New Hampshire hydro from NEP to PSNH would result in a redistribution of the benefits of this capacity among the member companies of NEPOOL. The principal beneficiary would be PSNH and the principal company harmed would be NEP.

Q. Would the total cost of supplying electricity to all New England customers change in any way as a result of a unit contract sale to PSNH?

A. No. There would be no change in the total cost of supplying electricity to New England customers as a whole.

Q. Are you aware of early testimony in this proceeding which suggested that there would be an overall savings in the cost of electricity to customers in New England as a result of such a unit contract?

A. Yes, I am and I disagree with that conclusion.

Q. Please explain.

A. From my standpoint, the basic flaw in that testimony is the assumption that Bear Swamp would be pumped by idle nuclear generation and thereby make up some economic loss which would be incurred by NEP as a result of the loss of the hydro energy. In fact, there is no such idle nuclear generation available within the NEP system or anywhere in NEPOOL.

The plain fact is that NEPEX is making the maximum economic use of the capacity available at Bear Swamp, and if it were not doing so, it would not be doing its job of economic dispatch. As I stated in my previous testimony, through NEPEX economic dispatch the NEPOOL utilities saved $44 million by comparison with operation on an individual basis. If more than $44 million in savings could have been achievable, NEPEX would not be doing its job.

Q. Mr. Bigelow, do you wish to make any concluding remarks?

A. The New Hampshire hydro units are valuable resources that play an important part in the NEPOOL dispatch to serve the customers of New England. They are dispatched by NEPOOL to maximize the benefits for all New England. A unit contract sale of these resources to PSNH would in no way affect the actual dispatch. It would, however, force the customers of NEP to pay more for electricity by an amount approximately equal to the amount that customers of PSNH would pay less for electricity.

b. New Hampshire Supreme Court ("NHSC").

(1.) NHSC: Affidavit of Frederick J. Nemergut (10-22-80).

1. I, Frederick J. Nemergut, am presently the Director of Economic Analysis and Planning for the Executive Office of Energy Resources of the Commonwealth of Massachusetts.
2. This position entails the monitoring of energy supply and demand for the Commonwealth and the Region, including electricity supply and demand, and formulating policies to deal with the cost of energy and possible interruptions in supplies.
3. After consulting with the appropriate members of my staff, I have assessed the amount of electricity supplied to the Commonwealth, and its municipalities, authorities and citizens, by the Massachusetts Electric Company ("MECo") and impacts of the recent decision by the New Hampshire Public Utilities Commission to withhold from export the hydroelectric energy generated by the New England Power Company ("NEPCo") in New Hampshire which had previously been sold, in part, to MECo for resale.
4. The retail sales of electricity by MECo to public and private customers within its service areas (see map of electric utility service areas in the Commonwealth attached and incorporated herein as Appendix "A") for the latest time period reported, 1979, is as follows:

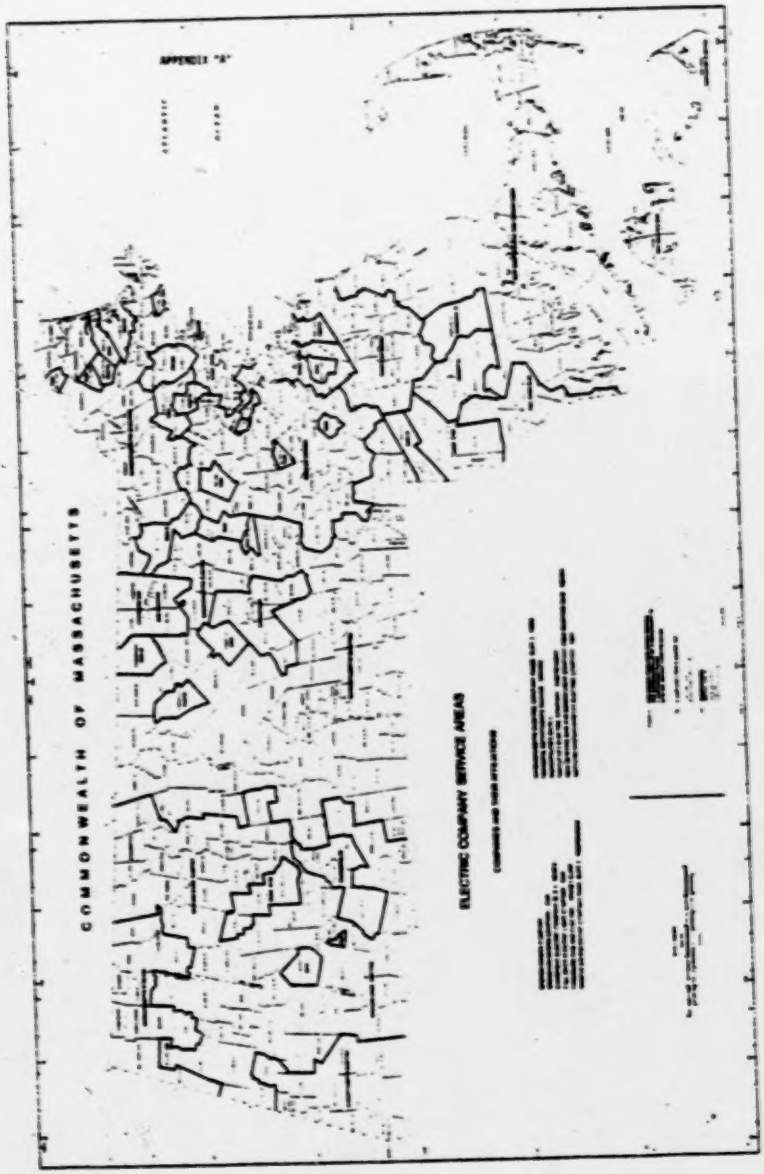
Customer Class	MECo Sales (MWH)*	Percent of NEPCo (NEES)**
Residential	4,336	73.8%
Commercial	3,491	70.6%
Industrial	3,101	80.0%
Street Lights	119	68.0%
Sales for Resale	5	0.6%
Losses and Internal Use	629	41.7%
TOTAL	11,744	67.4%

5. MECo sells this electricity to the citizens of the Commonwealth within its service area and to all of the municipalities within its service areas, such as the Cities of Worcester, Lawrence, Lowell and Methuen, and small towns such as Pepperell, Dunstable, and Tyngsborough. As well, State facilities within the MECo service areas, such as the Danvers State Mental Health Institution, Salem, Worcester and North Adams State Colleges and the University of Lowell, purchase electricity from the company.
6. In my opinion, if NEPCo is prevented from including hydroelectric energy produced in New Hampshire in its average running cost, which it charges to MECo for this sale of electricity, the immediate result will be an increase in the per-killowatt-hour cost of electricity to the citizens of the Commonwealth through payments made by the consumers, businesses, industries, hospitals, state facilities and municipalities within the MECo service areas.
7. Also, in my opinion, if the New Hampshire Public Utilities Commission estimate that the lower cost of hydroelectric energy produced by New England Power Co. in New Hampshire is $25,000,000.00 per year, then, assuming the demand mix for 1979 in paragraph 4., supra., remains approximately the same, then the annual cost to the citizens, municipalities, State institutions, businesses and industries will be *$16,850,000.00* per year, and will be reflected in property tax rates, increased costs of living and doing business.

*MWH = Megawatt-hours, or the equivalent of one million watts of energy used for one hour of time.
**MECo and NEPCo are subsidiary corporate parts of the New England Electric Systems, Inc., or "NEES".

/s/ DATE: October 22, 1980

Frederick J. Nemergut, Director
Economic Analysis and Planning
Executive Office of Energy Resources
[Witnessing omitted.]


APPENDIX "A"
COMMONWEALTH OF MASSACHUSETTS
ELECTRIC COMPANY SERVICE AREAS

Appendix "A."

(2.) NHSC: Supplemental Affidavit of Frederick J. Nemergut (11-5-80).

* * *

1. I, Frederick J. Nemergut, am presently the Director of Economic Analysis and Planning for the Executive Office of Energy Resources of the Commonwealth of Massachusetts.
2. This position entails the monitoring of energy supply and demand for the Commonwealth and the region, including electricity supply and demand, and formulating policies to deal with the cost of energy and possible interruptions in supplies.
3. After consulting with the appropriate members of my staff, I find it necessary to amend my affidavit of October 22, 1980 in Docket No. 80-396 by way of expanding on the impacts of the recent decision by the New Hampshire Public Utilities Commission to withhold from export the hydroelectric energy generated by the New England Power Company ("NEPCO") in New Hampshire which had previously been sold, in part, to Massachusetts Electric Company ("MECO") for resale.
4. In addition to the retail sales of electricity by MECO to public and private customers within its service areas, NEPCO sells wholesale power directly to municipally owned electric light companies within Massachusetts for resale to their customers. During 1979, these wholesale sales totaled 1,317,000 MWh of a total of 13,061,000 MWh sold in Massachusetts by NEPCO.
5. MECO provides direct service to the following agencies and departments of the Commonwealth: the Department of Environmental Quality Engineering; the Metropolitan District Commission; Department of Public Works; the Public Welfare Department; the Division of Employment Security; Military Divisions; the Registry of Motor Vehicles; the Massachusetts Port Authority; the Depart-

ment of Education, the Executive Office of Administration and Finance; the Massachusetts Defenders Committee; the Immigration Department; the Civil Defense Department; the Department of Mental and Public Health; the Executive Office of Energy Resources; the Department of Environmental Management; the Massachusetts Turnpike Authority; the State Police; the Department of Fisheries and Game; the Executive Office of Economic Affairs; the Massachusetts Bay Transit Authority; the Division of Parks and Recreation; the Correctional Department; and the Marine and Fisheries Department.

On an annual basis, this amounts to $6,000,000 in expenditures of tax revenues which would be increased if the P.U.C. decision to prevent exportation of hydroelectric energy remains in effect.

6. The various municipalities within the MECO service areas expended $11,700,000 in revenues to pay MECO for street lighting in those various municipalities.
7. The energy currently used by NEPCO from these hydroelectric facilities must be replaced in the near term from existing energy sources. The replacement fuel will be oil given the fact that all NEPCO's existing nuclear and coal-fired capacity is presently base-loaded with no additional energy available. This distribution of oil-fired energy for hydroelectric energy will result in an increase in the cost of fuel to the Massachusetts ratepayers of NEPCO and MECO. This increase in NEPCO's fuel cost, which will be passed on directly through the Fuel Adjustment Clause, is estimated to be in the range of $51.9 million to $111.5 million per year based on today's fuel costs. In future years, this additional fuel cost can be expected to escalate at an annual rate proportional to the annual rise in the cost of oil.

8. The ratepayers of MECO are paying $5,000,000 on an annual basis to provide a return on the investment in the hydroelectric generating facilities in New Hampshire that will be no longer "used and useful" to them. The revenues generated by a unit contract for the energy from these facilities will not be credited to these ratepayers but to NEPCO only.
9. A widening of the disparity of energy costs between the Commonwealth of Massachusetts and the State of New Hampshire in New Hampshire's favor would increase the likelihood of industry choosing to locate or relocate in New Hampshire, impacting adversely the revenues of the Commonwealth associated with property, business income and personal income taxes.
10. In addition to the loss of hydroelectric energy, NEPCO may need to replace the 420 MW of hydro capacity. According to the New England Electric System (NEES) corporate planning model, "NEESPLAN 1980-1995", a reduction in NEPCO's power supply capacity by the 420 MW will result in altering the time frame of future additions to capacity. The result is to advance by perhaps six years, the point where projected supply no longer meets projected capacity requirements. To satisfy the deficity is not a simple matter. In the time frame in question there are few alternatives of sufficient capacity to help satisfy NEPCO's capacity needs. There is also insufficient lead time for construction by NEPCO of a coal fired unit before the end of the NEEPLAN study period given the present regulatory climate.

DATE: November 5, 1980

Frederick J. Nemergut, Director
Economic Analysis and Planning
Executive Office Of Energy Resources

[Witnessing omitted.]

Office-Supreme Court, U.S.
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MAR 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY,
Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, THE STATE OF NEW HAMPSHIRE, NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, THE COMMONWEALTH OF MASSACHUSETTS, AND THE STATE OF RHODE ISLAND,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MOTION OF THE STATE OF NEW HAMPSHIRE AND NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION TO DISMISS OR AFFIRM

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February 1981

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1208

NEW ENGLAND POWER COMPANY,
Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *et al.*,
Appellees

MOTION TO DISMISS OR AFFIRM

The appellees State of New Hampshire and New Hampshire Public Utilities Commission respectfully move to dismiss the captioned appeal or affirm the judgment of the Supreme Court of the State of New Hampshire on the ground that the questions presented are so unsubstantial as not to warrant further argument.

SUMMARY OF ARGUMENT

New Hampshire Public Utilities Commission Order No. 14492 is not preempted by Part I of the Federal Power Act. A state law is preempted by a federal law only if it is unmistakable that the Congress has entirely

preempted the field to which the law applies, or the state law is so inconsistent with the federal law that it stands as an obstacle to the accomplishment of the objectives of Congress. Congress did not occupy the field of electric utility regulation. Sections 19, 20 and 201(a) of the Federal Power Act clearly recognize that the regulation of the field of electric utilities is to be shared between the state and federal governments. The order of the New Hampshire Public Utilities Commission does not conflict with Part I of the Federal Power Act. The objective of Congress in enacting Part I of the Federal Power Act was to provide for federal control over the development of the waterways of the United States, to the end that the uses of any particular waterway or group of waterways will be harmonious one with the other, and will not impair the use of those waterways as highways for interstate commerce. The emphasis in Part I of the Federal Power Act is over the development of projects. States are preempted from interdicting the development of a project on a waterway subject to the jurisdiction of the United States. However, the states remain free to regulate the sales of electricity which is generated at projects approved by the Federal Power Commission pursuant to Part I. Section 9 of the Federal Power Act specifically recognizes the authority of the states to regulate the sale of hydroelectric energy. There is no requirement in the Federal Power Act that electrical energy generated at projects on the waters subject to the jurisdiction of the United States be sold in interstate commerce. Consequently, Order No. 14492 is not preempted by Part I of the Federal Power Act.

New Hampshire Public Utilities Commission Order No. 14492 is a valid exercise of state authority to which the Congress has consented. The breadth and usual ex-

clusivity of the regulatory authority of the Federal Power Commission, pursuant to Part II of the Federal Power Act is irrelevant to the instant case, because the Congress has specifically provided an exception to that exclusive federal authority, and granted that authority to the states. When the Congress enacted section 201(b) of the Federal Power Act in 1935, it did so with the holding of *Public Utilities Commission v. Attleboro Steam & Electric Company* well in mind. The Congress was thus aware that states could not regulate the interstate sale of electricity at wholesale. Consequently, the Congress would not have merely saved a state statute regulating interstate sale of hydroelectric energy, for to do so would be a meaningless act. Representative William A. Rogers, the representative of New Hampshire in the United States House of Representatives, urged the passage of section 201(b) of the Federal Power Act, and in doing so characterized the language in that section in terms of a grant, and the continuation of the exercise of 22 years of regulatory authority over public utilities. Thus, the context of the enactment of section 201(b) is one of a grant of authority. The timing of the enactment of that section also indicates that it is a grant of authority. The section was enacted at the same time that the Congress amended section 23 of the Federal Power Act so as to subject virtually all hydroelectric projects to the control of the United States. Only the smallest hydroelectric projects located on the most obscure streams in New Hampshire, would be beyond the reach of the Federal Power Commission. Those projects would be regulated by the State of New Hampshire without any savings clause in Part II of the Federal Power Act. An interpretation of section 201(b) of the Federal Power Act which limited its applicability to projects not

licensed under Part I of the Federal Power Act makes that section a meaningless gesture. The regulatory authority of the State of New Hampshire to which the Congress has consented is as broad as the authority conferred upon the Federal Power Commission by section 201 of the Federal Power Act. The grant of authority to the state is found in the same section as the grant of authority to the Federal Power Commission and is also a limitation on that authority. The words of the statute itself recognize that the energy which is subject to regulation by the state "is transmitted" in interstate commerce. The Congress had in mind certain state statutes, then existing, when it enacted section 201(b) of the Federal Power Act. An examination of those statutes reveals that they are all broad regulatory statutes, including the fixing of rates, and the avoidance of contracts which are contrary to the state policy. In any event, Order No. 14492 does not regulate the sale of power outside the State of New Hampshire. It is limited to an order to sell the power generated on the Connecticut River to utilities within the State of New Hampshire. Even if the authority of the State of New Hampshire does not extend to fixing the rates at which that power must be sold, the order of the Public Utilities Commission is nonetheless valid. Under that order, the New England Power Company is required to sell the power generated at the Connecticut River hydroelectric stations to utilities in the State of New Hampshire. It is left to the Federal Energy Regulatory Commission to fix the price at which that power shall be sold. Further, in such a situation, there is no unjust discrimination within the meaning of sections 205 and 206 of the Federal Power Act. If New Hampshire has complete jurisdiction, then those sections do not apply to the sale of power in the State of New Hampshire.

If the authority of the State of New Hampshire is limited to fixing the place at which the power will be sold, the Federal Energy Regulatory Commission is bound by that determination, and may not find the order to be unjustly discriminatory.

ARGUMENT

I. NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION REPORT AND ORDER NUMBER 14492 IS NOT PREEMPTED BY PART I OF THE FEDERAL POWER ACT.

A state act is not preempted by federal law unless Congress intended to occupy the entire field wherein the state has acted, or the state act is so inconsistent with the federal law that the state act must give way. *Jones v. Rath Packing Company*, 430 U.S. 519, 525-26 (1977). It is assumed that Congress did not intend to occupy an entire field where that subject was historically regulated by the states. In order to conclude that Congress intended to occupy an entire field of endeavor, that conclusion must be unmistakable. *Id.*, at 525. A state act conflicts with federal law only if, in the circumstances of the particular case, the state act stands as an obstacle to the accomplishment of the objectives of Congress. *Id.*, at 526.

A. Congress did not, in Part I of the Federal Power Act, occupy the entire field of the regulation of electric utilities.

The regulation of electric utilities had traditionally been performed by the states. *United States v. Public Utilities Commission of California*, 345 U.S. 295, 302-03 (1953). An intention to occupy the entire field of electric utility regulation is not manifest from Part I of the Federal Power Act. To the contrary, in Part I of the

Federal Power Act, Congress specifically recognized the desirability of state authority. In section 19 of the Federal Power Act (16 U.S.C. 812) the Congress specifically provided for the regulation of intrastate sales of power generated at a licensed facility by the state in which the sale was made. While not sufficient to vest the states with authority to fix the rate at which electricity energy will be sold at wholesale in a foreign state, section 20 of the Federal Power Act (16 U.S.C. 813) constituted a Congressional recognition that the states would regulate the bulk of interstate sales. *United States v. Public Utilities Commission of California,* above, at 303. Thus, the Federal Power Commission was to regulate rates under Part I of the Federal Power Act only if a state could not. *Federal Power Commission v. Southern California Edison Company,* 376 U.S. 205, 218 (1964). Consequently, the Congress did not, by Part I of the Federal Power Act, occupy the field of electric utility regulation.

B. New Hampshire Public Utilities Commission order number 14492 does not conflict with Part I of the Federal Power Act.

If the Congress has occupied any field by the enactment of Part I of the Federal Power Act, it is the field constituting the development of the navigable rivers of the United States. The objective of the Congress in enacting Part I was to assure that that development would be in accordance with a comprehensive plan. The factors included within that objective are whether there will be a project for the development of a navigable river, where that project will be, what the design of that project will be, and what the size of that project will be. *First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 U.S. 152 (1946).

Order number 14492 does not inhibit the development of the Connecticut River. Unlike the situation obtaining in *First Iowa Hydro-Electric Cooperative*, above, the order of the New Hampshire Public Utilities Commission does not prohibit the development of any project on the Connecticut River. That order does not prohibit the pooling of energy pursuant to the New England Power Pool agreement. The order merely requires that the power which is generated at projects on the Connecticut River be sold within the State of New Hampshire. Part I of the Federal Power Act does not require that power generated at a licensed project be sold in a state other than the state of production. The interstate sale of power is not even a consideration. Section 10(a) of the Federal Power Act (16 U.S.C. 803) provides that, in order to obtain a license, a project must

> "... be best adapted to a comprehensive plan for the improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes..."

The Congress intended by that language that, by exercising federal control over the licensing of projects, the use of a particular waterway or group of waterways for various purposes, will be harmonious. Thus, the construction of a project on one part of a river, which is primarily intended to improve the recreational opportunities in the area, would not be permitted to be developed in such a way that it would cut at cross purposes to the use of the river, either at that location or elsewhere on the river, as a highway for interstate or foreign commerce. Similarly, such a recreational project would be developed in such a way so as to be compatible with the improvement of the river for water-power de-

velopment. A reading of the statute indicates that the reference to interstate and foreign commerce is to the use of the waterway as a highway, and not to the place where any power developed on a river is to be sold. *Federal Power Commission v. Union Electric Company*, 381 U.S. 90, 98 (1965).

Further, Part I of the Federal Power Act recognizes that there may be state requirements affecting a would be licensee which would prohibit the licensee from implementing the permission to develop a project, if granted by the Federal Power Commission. Section 9 of the Federal Power Act (16 U.S.C. 802) requires an applicant to submit to the Commission evidence that the applicant has complied with the requirements of the state "with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter." While that section does not permit a state to veto the issuance of a license by the Federal Power Commission by requiring the applicant to apply also for a state license to develop the same project, it constitutes a recognition that the laws of the states, unrelated to permission to develop a project on a waterway, are not preempted by the federal legislation. *First Iowa Hydro-Electric Cooperative*, above, at 161. An illustration of this concept is found in the case of *State of Washington Department of Game v. Federal Power Commission*, 207 F. 2d 391, 396 (9th Cir. 1953). In that case the court held that, while the City of Tacoma need not show, as a condition of obtaining a Federal Power Commission license under Part I of the Federal Power Act, that the City had complied with the laws of the State of Washington regulating the construction of dams, that did not resolve the question as to whether

the City of Tacoma had the legal capacity to initiate and act under the license once it was granted. The court said, "[t]here may be limitations in the City Charter, for instance, as to indebtedness limitations. Questions of this nature may be inquired into by the Commission as relevant to the practicability of the plan, but the Commission has no power to adjudicate them." *Id.*, at 396-97.

Thus, it may be observed that the design of Part I of the Federal Power Act includes many areas reserved for the action of the several states. The states may act except in those areas which would prevent the issuance of a license by the Federal Power Commission. The order of the New Hampshire Public Utilities Commission now under review has no effect at all upon the issuance of a license by the Federal Power Commission. Consequently, New Hampshire Public Utilities Commission order number 14492 is not preempted by Part I of the Federal Power Act.

II. NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION ORDER NO. 14492 IS A VALID EXERCISE OF STATE AUTHORITY TO WHICH THE CONGRESS CONSENTED IN PART II OF THE FEDERAL POWER ACT.

The brief of the New England Power Company (hereinafter referred to as the "Company") contains an exhaustive analysis of the breadth and pervasiveness of the regulatory authority of the Federal Energy Regulatory Commission (the successor agency to the Federal Power Commission), and repeated assertions of the exclusivity of that regulatory authority. However, the breadth and pervasiveness of that regulatory authority is irrelevant to the question before this court, for the

Congress has carved an exception to that otherwise exclusive regulatory authority, and, in the area of that narrow exception, conferred that authority upon the State of New Hampshire.

A. Section 201(b) of the Federal Power Act (16 U.S.C. 824(b)) is a congressional consent to state regulation over the sale of power generated at hydroelectric stations.

It is well settled that a state can regulate commerce by consent of the Congress where such regulation would otherwise be impermissible. *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 769 (1945). It is constitutionally permissible for the Congress to consent to regulation of interstate commerce by the states. *Prudential Insurance Company v. Benjamin,* 328 U.S. 408 (1946). The enactments of legislatures are to be interpreted so as to give effect to the intention of the legislature. *Philbrook v. Glodgett, 421 U.S. 707 (1975).*

In 1935, the Congress enacted section 201(b) of the Federal Power Act. That section, after intervening amendments, is found in its present form at 16 U.S.C. 824(b), and provides:

> "(b)(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, *but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a state or state commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted over a state line.* The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facili-

ties for the transmission of electric energy consumed wholly by the transmitter.

"(b)(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence." (emphasis supplied).

Section 201(b) is to be read in the light of the policy statement enunciated by the Congress in section 201(a) of the Federal Power Act (16 U.S.C. 824(a)), to wit: that "... Federal regulation, [is] however to extend only to those matters which are not subject to regulation by the States." *Connecticut Light and Power Company v. Federal Power Commission*, 324 U.S. 515, 527 (1945). The intention of the Congress in enacting Part II of the Federal Power Act was to preserve the authority of the states. *Id.* While the emphasized language is not that usually used by a legislature when consenting to an act, if the foregoing relationship between the sovereigns is kept in mind, an analysis of the context and timing of the enactment of the emphasized portion of section 201(b) discloses that the Congress intended to and did consent to the exercise by the State of New Hampshire of regulatory authority over hydroelectric power generated within the state.

In 1927, the Supreme Court of the United States had declared that the states were prohibited by the commerce clause from regulating the rates for the interstate sale of electric energy at wholesale. *Public Utilities Com-*

mission v. Attleboro Steam & Electric Company, 273 U.S. 83 (1927). In reaching that conclusion the Supreme Court relied heavily upon its earlier case of *West v. Kansas Natural Gas Company*, 221 U.S. 229 (1911). In *West*, the Supreme Court had held that a state was prohibited by the commerce clause from preventing the introduction of natural gas into interstate commerce. U.S. Constitution, Art. I, section 8, Cl. 3. It was to fill that regulatory gap that the Congress enacted Part II of the Federal Power Act, conferring that regulatory authority upon the Federal Power Commission. *U.S. v. Public Utilities Commission of California*, above, 307-08. Consequently, at the time it enacted section 201(b) of the Federal Power Act, Congress knew that the states could not regulate the interstate sale of electric energy. When Congress enacted the original water power act, in 1920, it had provided in section 20 of that act (16 U.S.C. 813) for the states to regulate the interstate sale of electric power generated at hydroelectric facilities licensed by the Federal Power Commission pursuant to that act. At the time the Congress enacted section 201(b) of the Federal Power Act in 1935, it was aware that its earlier language in section 20 of the water power act had not been effective to grant to the states the authority to regulate interstate sales of electricity. *Federal Power Commission 9th Annual Report*, 119, 123-24; *Public Utilities Commission v. Attleboro Steam & Electric Company*, above. With the knowledge of the states' inability to regulate interstate sales of electricity, and the ineffectiveness of their earlier enactment, the Congress could not have intended to enact another illusory "savings" provision. Rather, the Congress must have intended to confer authority upon the states, as the Congress knew that in the absence of such a grant, the states had no

authority. Consequently, the emphasized portions of section 201(b) of the Federal Power Act must be construed as a consent to state regulation of hydroelectric energy.

The emphasized language was not in section 201(b) of the Federal Power Act at the time it was introduced in the House of Representatives after passage by the Senate. That clause was inserted by the house committee. *H.R. Rep. No. 1318*, 74 Cong. 1st. Sess. p. 27 (1935). That clause, as recommended by the committee, was approved by the House of Representatives upon the urging of New Hampshire Representative William A. Rogers. In urging his colleagues to adopt the emphasized portion of section 201(b), Representative Rogers said:

> "Just one further word. I do want to call attention, if I have a moment, to the fact that as a result of the service rendered by the junior senator from New Hampshire [Senator Fred H. Brown] on the public service commission of our state, we for a long time, have had a public service commission which properly protects the rights of the citizens as against these damnable curses [public utility companies]; but the senate bill as originally drawn would deprive certain states, I think five in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the state line. This situation has been taken care of by the house committee, and I hope when you come to it, section 201 of Part II, that you will grant us the privilege to continue, as we have been for 22 years, to exercise our state right over the exportation of hydroelectric energy transmitted across state lines but produced up there in the granite hills of old New Hampshire. (applause) (Here the gavel fell) 79 Cong. Rec. 10527.

There are several significant points contained in the address of Representative Rogers. He referred to the regulation of public utilities by the New Hampshire

Public Service Commission, the predecessor of the present-day Public Utilities Commission. He referred to that regulation for 22 years prior to his address in 1935. That is, regulation in the period 1913 to 1935. RSA 374:35 and 36 were enacted in 1913 as amendments to the 1911 public service commission act. Laws 1913, 145:17. That is the significance of the word "lawfully" in the emphasized portion of section 201(b). The word lawfully refers to state statutory law, as compared to inherent authority, and is a limiting characteristic in the grant, to wit: only states which have demonstrated a willingness to regulate hydroelectric energy by providing statutory law to that end, were to receive the benefit of the grant. Representative Rogers indicated that that statutory law in New Hampshire produced regulation by the Public Service Commission which had as its purpose the protection of the rights of New Hampshire's citizens against the public utility companies. Representative Rogers asked his colleagues to permit the state to "continue" to "exercise" that regulatory authority notwithstanding the grant of regulatory authority to the Federal Power Commission. Lastly, it is significant that Representative Rogers used the word "grant" when asking his colleagues to permit the state to so continue. Since Representative Rogers went to such lengths to explain the desirability of the emphasized portion of section 201(b) in terms of state regulation of public utilities, which rationale was approved by his listeners, as indicated by the applause, the emphasized portion of section 201(b) must be a consent to continue state regulation. To hold otherwise would render the clause a meaningless gesture, for in the absence of a grant, the states would not be able to "continue" to exercise their regulation over hydroelectric energy. When the em-

phasized portion of section 201(b) is read in conjunction with the policy statement set forth in section 201(a), and in the context of the remarks of its proponent, it is clear that the Congress intended to consent to state regulation of hydroelectric energy.

The timing of the enactment of the emphasized portion of section 201(b) of the Federal Power Act also indicates that the Congress intended to consent to state regulation of hydroelectric energy. By the Rivers and Harbors Appropriation Act of 1899, Congress had prohibited the construction of any hydroelectric projects in navigable waters without its consent. 33 U.S.C.A. 403. By section 4(d) of the Water Power Act (16 U.S.C. 797(e)), the Congress conferred upon the Federal Power Commission the authority to grant that consent. The requirement for a permit extended only to navigable streams. Section 23 of the Water Power Act, as originally enacted in 1920, provided that any person intending to construct a project on a river, other than a navigable river, could in his discretion, file a declaration of that intention with the Federal Power Commission, which would then proceed to determine whether the project was to affect interstate commerce. If the Federal Power Commission found that the project would affect interstate commerce, a permit was required. 41 Stat. 1075 (1920). Consequently, just prior to 1935, a federal permit was not required for projects on non-navigable waters. However, in the same session law wherein the Congress enacted the emphasized portion of section 201(b) of the Federal Power Act, the Congress also amended Part I of the Federal Power Act so as to provide that all persons were required to file with the Federal Power Commission a declaration of inten-

tion to construct a project on any waterway in the United States. If the Federal Power Commission found the waterway to be a navigable water of the United States, or if the Commission found that the project would affect interstate commerce, a permit was required. 49 Stat. 838, 16 U.S.C. 817. Consequently, at the time the Congress enacted the emphasized portion of section 201(b) of the Federal Power Act, it expanded the licensing authority of the Federal Power Commission to include virtually all waterways in the United States. Any project that was so small that it would not require a Federal Power Commission license, would not be generating any power for sale in interstate commerce at wholesale. Any power generated would be limited to intrastate commerce. Such commerce was committed to the sole regulatory authority of the states by sections 19 and 201(b) of the Federal Power Act. 16 U.S.C. 812, 824(b). It would make no sense to merely grant an exception from the regulation of interstate commerce by the Federal Power Commission, as the Company suggests, to those small hydroelectric projects which wouldn't be regulated by the Federal Power Commission anyway.

Further, at the time the Congress enacted the emphasized portion of section 201(b), in 1935, the Connecticut River was navigable in fact. *Bellows Falls Hydro-Electric Corporation*, 2 F.P.C. 380, 385-86 (1941). Consequently, at the time of the enactment of section 201(b) the Connecticut River was already within the licensing jurisdiction of the Federal Power Commission. However, Representative Rogers, who urged the enactment of the emphasized portions of section 201(b), must have been aware that the State of New Hampshire had specifically included the Connecticut River within

the scope of RSA 374:35 and 36. This is so because Representative Rogers' cohort in securing the passage of the emphasized portion of section 201(b), Senator Fred H. Brown, had served for a long time on the New Hampshire Public Service Commission. Senator Brown would have known that RSA 374:35 and 36, as originally enacted in 1913, contained an express exclusion of the Connecticut River from its terms. Laws 1913, 145:17. However, in 1926, that exclusion of the Connecticut River was dropped from the statute. P.L. 240:33. Consequently, in the face of a patent desire on the part of the State of New Hampshire to control the sale of hydroelectric energy from projects on the Connecticut River, which was sheperded through the Congress by two of the state's representatives to the Congress, it is not possible that the Congress intended merely to not interdict the state's authority over hydroelectric projects on waterways other than the Connecticut River.

Considering section 201(b), in the light of the policy statement set forth in section 201(a) of the Federal Power Act, and in the light of the timing of its enactment, the Congress must have intended to consent to the regulation of hydroelectric energy by the State of New Hampshire.

While not useful to understanding the intent of the Congress in 1935, the 1978 amendments to the Federal Power Act disclose an understanding by the 1978 Congress that the states then retained authority over the exportation of hydroelectric energy. In 1978, the Congress added what is now 16 U.S.C. 824a-1 to the Federal Power Act. By that section, the Congress authorized the Federal Energy Regulatory Commission

(the successor to the Federal Power Commission) (FERC) to exempt electric utilities from any provision of state law which would prohibit such a utility from participating in an area pooling arrangement such as the New England Power Pool. The statute recognizes that there are state laws which would prohibit the exportation of electrical energy which have not been pre-empted by the force of the Federal Power Act alone. Those laws are the state laws preserved by section 201(b) of the Federal Power Act (16 U.S.C. 824(b)). This is made clear when one observes that, after the 1978 amendments, section 201(b)(1) of the Federal Power Act, in pertinent part, provides that Part II of the Federal Power Act, "... *except as provided in paragraph (2)* shall not ... deprive a state or state commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted over a state line." 16 U.S.C. 824(b)(1). In paragraph (2) of that section, it is provided that sections 210-212 of the Federal Power Act (16 U.S.C. 824i, 824j and 824k) shall deprive a state of its control over hydroelectric energy. Those latter sections provide for the mandatory interconnection of utilities and the involuntary wheeling of power over the transmission lines of a nonproducing utility.

In view of all of the foregoing, the emphasized clause in section 201(b) of the Federal Power Act must be interpreted as the consent of the Congress to the regulation of hydroelectric energy by the State of New Hampshire.

B. The scope of the regulation of hydroelectric energy by the State of New Hampshire to which the Congress has consented is as broad as the authority which is otherwise conferred upon the Federal Power Commission by section 201 (b)(1) of the Federal Power Act.

That the authority delegated to the states is as broad as that otherwise conferred upon the Federal Power Commission is apparent from the words of section 201(b). The grant of authority to the states is contained in the same section as the grant of authority to the Federal Power Commission. The effect of the grant of authority to the states is to exclude the Federal Power Commission from that authority because the federal regulation extends "only to those matters which are not subject to regulation by the states." 16 U.S.C. 824(a).[1] Further, the statute itself recognizes that the authority of the states shall be exercised over energy "which *is transmitted over a state line.*" 16 U.S.C. 824(b)(1). Thus, the authority of the State of New Hampshire over hydroelectric energy extends to the transmission and sale of that energy in interstate commerce.

In order to determine the scope of the grant of authority to the states it is also useful to look to the statutes preserved by section 201(b) of the Federal Power Act. They are NH RSA 374:35 and 36, Wisconsin Statutes, 1931 edition, section 31.27, and West Virginia Acts, (1929) Ch. 58, sections 3(j) and 6(f). *Safe Harbor Water Power Corporation*, 5 F.P.C. 221, 235 (1946). The New Hampshire statute, RSA 374:35 and 36, makes provision for the determination of reasonable rates for hydroelectric energy. Further, while those sections are now contained in the general regulation chapter of the Revised Statutes Annotated, they were originally enacted as an integral part of the Public Service Commis-

[1] The comment in *United States v. Public Utilities Commission of California*, above, at 300, that the section 201(b) grant of authority to the state does not appear to extend to ratemaking, is dictum. Its presence in a footnote indicates that that clause was not at issue in that proceeding.

sion Act at the same time, and in the same session law, as the enactment of ratemaking provisions now contained in Chapter 378 of the Revised Statutes Annotated. Laws 1913, 145. The Wisconsin statute provides for the determination of a reasonable rate for hydroelectric energy. The statute further provides that the Public Utilities Commission has the power to declare void any contracts for the sale of hydroelectric energy which may have been entered into by the public utility. Wis. Stat. (1931) sec. 31.27. The West Virginia statute provides for the fixing of rates (section 3 (j)), and for the preference of West Virginia citizens as to the use of the power generated by the utility, which may be enforced by the commission by "appropriate orders." W. Va. Acts (1929) Ch. 58, sec. 3(j) and 6(f). Thus, the statutes intended to be preserved by the Congress when it enacted section 201(b) of the Federal Power Act provide for the fixing of rates, or are part of an overall rate regulatory scheme including the fixing of rates. Consequently, the scope of authority conferred upon the states by that section includes the authority to fix rates and generally regulate the transmission and sale of hydroelectric energy.

The same conclusion is reached when section 201(b) is viewed in relation to Part I of the Federal Power Act. Under Part I, the sale of hydroelectric energy from the Connecticut River projects to other utilities in the State of New Hampshire, even at wholesale, would be an intrastate sale subject to the regulation of the state commission pursuant to section 19 of the Federal Power Act (16 U.S.C. 812). Since the state could regulate those sales prior to 1935, the intention of the Congress to continue the authority previously exercised by the states after the enactment of Part II of the Federal Power Act,

includes an intention to permit the states to regulate intrastate sales of hydroelectric energy at wholesale, even though the provider of that energy or the recipient of that energy is interconnected with other electric utilities located outside the State of New Hampshire. Compare *Public Utilities Commission v. Attleboro Steam & Electric Company*, above, and *Federal Power Commission v. Southern California Edison Company*, above.

Even though the authority delegated to the State of New Hampshire extends to the regulation of sales of power generated in the State of New Hampshire but transmitted outside of the State of New Hampshire, New Hampshire Public Utilities Commission Order 14492, under review in this proceeding, does not regulate the sale of power outside the State of New Hampshire. The order of the Commission required the Company to sell the hydroelectric power in the State of New Hampshire. Contrary to the suggestions of the Company, there is no need to sever wires in order to sell that power in New Hampshire. Indeed, the continuation of the New England Power Company in the New England Power Pool, and the pooling of the energy generated on the Connecticut River, are not inconsistent with the sale of that energy in the State of New Hampshire. The New England Power Company presently sells the power generated on the Connecticut River under contract to utilities located in Massachusetts and Rhode Island, yet pools that energy in the New England Power Pool.

In view of the wording of section 201(b) of the Federal Power Act, its relation to Part I of the Federal Power Act, and the provisions of the statutes it was intended to preserve, New Hampshire Public Utilities Commission Order No. 14492 is well within the scope of

the authority delegated by the Congress to the State of New Hampshire.

C. New Hampshire Public Utilities Commission Order 14492 is valid even if the regulatory authority of the State of New Hampshire to which the Congress consented in Part II of the Federal Power Act does not extend to rate fixing.

New Hampshire Public Utilities Commission Order 14492 does not invade the exclusive rate fixing authority of the Federal Energy Regulatory Commission. The order of the New Hampshire Public Utilities Commission requires the Company to sell the power generated on the Connecticut River to entities in the State of New Hampshire. That order does not fix the rate at which the sale will be made. Because the State of New Hampshire has the authority to require that the power previously sold out of the state be sold within the state, as has been established by Part II.A. of this argument, the New Hampshire Public Utilities Commission can order such a sale, and leave it to the Federal Energy Regulatory Commission to approve the price after the Company and other utilities in the State of New Hampshire have negotiated an agreement. The order of the New Hampshire Public Utilities Commission does not require any amendments or changes to rates or contracts in force for the sale of electric energy to persons outside of the State of New Hampshire. The order is only that the hydroelectric energy generated on the Connecticut River be sold in the State of New Hampshire. The Company might find it necessary or desirable to change those existing rates or contracts in order to maintain its profit margin. However, while that may be a consequence of the New Hampshire Public Utilities Commission order, the order does not require it. Many orders

of the New Hampshire Public Utilities Commission have consequences felt outside the State of New Hampshire. Because of the undisputed division of authority between the states and the federal government in the field of electric utility regulation, the ripple effect, both federal to state and state to federal, is common. This ripple effect is the change in the circumstances in which a regulatory body performs its regulatory function which has been brought about by the performance of the regulatory function of another regulatory body. For example, when the New Hampshire Public Utilities Commission refuses to include in the rate base of the Public Service Company of New Hampshire the cost of construction work in progress, that reduced rate base probably has an effect upon the risk of the company, and consequently an effect upon the cost of common equity to the Public Service Company of New Hampshire. A similar effect upon the cost of common equity might result from a reduction by the New Hampshire Public Utilities Commission of the rates of the Public Service Company of New Hampshire to the lower edge of the zone of reasonableness. If the Public Service Company of New Hampshire then applied to the Federal Energy Regulatory Commission for an increase in its wholesale rates, FERC would be determining the reasonableness of the requested rate increase in the circumstances of a higher cost of common equity, which was brought about because of actions of the New Hampshire Public Utilities Commission. That ripple effect has never been held to be an invasion of the exclusive rate fixing authority of the Federal Energy Regulatory Commission. In like manner, the order of the New Hampshire Public Utilities Commission to the New England Power Company to sell its hydroelectric power within the State of

New Hampshire will change the circumstances in which the Federal Energy Regulatory Commission would determine the reasonableness of the Company's rates in Massachusetts and Rhode Island, but would not be an invasion of the exclusive rate fixing authority of FERC.

The Company has also suggested, at several places in its brief, that sections 205(c) and 206(a) of the Federal Power Act (16 U.S.C. 824d(b) and 824e(a)) invalidate the New Hampshire Public Utilities Commission order as an undue preference, prohibited by those sections. (Company brief, p. 16). That argument substantially misses the point. If New Hampshire has complete jurisdiction over the sale of hydroelectric energy, including the fixing of rates, then the question of undue preference will never come before the Federal Energy Regulatory Commission. If, however, the authority of New Hampshire is limited to fixing the place wherein that hydroelectric energy will be sold, then any discrimination among the customers of the Company, be it undue or not, is not of the Company's doing, but is the exercise of a valid policy-making authority vested in the State of New Hampshire. Further, in that situation the Federal Energy Regulatory Commission would be bound by the New Hampshire Public Utilities Commission determination of the appropriate place for the sale of that energy, and would not be permitted to review that decision to determine whether it constituted an undue preference. *Connecticut Light & Power Company v. Federal Power Commission*, above. Lastly, as the Company admits, unit contracts, that is an agreement by one utility to deliver to another utility all or a fixed portion of the output of a given generating unit in exchange for the payment by the buying utility of the same portion of all of the fixed and running costs of that unit, are quite

common. It is obvious that one utility, that is one customer of New England Power Company, receives all of the benefit of the unit which is the subject of the unit contract. The Company does not explain why it is not an undue preference for the Company to enter into unit contracts generally, but would be an undue preference when that unit contract was with a utility in the State of New Hampshire. The record before this Court does not contain any information which would make that conclusion clear.

In summary, the Congress can and has consented to the exercise by the State of New Hampshire of regulatory authority over hydroelectric energy by the enactment of section 201(b) of the Federal Power Act. That conclusion is the necessary result of the words of the statute, the context of its enactment, and the timing of its enactment. The authority conferred upon the state is as broad, in its own narrow field, as the authority generally conferred upon the Federal Power Commission pursuant to section 201(b) of the Federal Power Act. That authority extends to the fixing of rates at which hydroelectric energy will be sold at wholesale within the State of New Hampshire. In any event, the order of the New Hampshire Public Utilities Commission under review in this proceeding does not fix the rates at which hydroelectric energy will be sold in the State of New Hampshire. Consequently, New Hampshire Public Utilities Commission Order 14492 is a valid exercise of state authority to which the Congress has consented by the enactment of Part II of the Federal Power Act.

CONCLUSION

For the reasons stated herein, either this appeal should be dismissed or the judgment of the Supreme

Court of New Hampshire should be affirmed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS

WEST VIRGINIA ACTS (1929)

Chapter 58

Section 3(j). To regulate the rates and charges for service to consumers of electricity and other power produced by any licensee hereunder and to regulate accounts of such licensees, all as provided by chapter fifteen-o of the code of West Virginia and all acts amendatory thereof. All such rates, charges and tolls for electricity and other power produced by any licensee shall be just and reasonable, and in fixing any rate hereunder the commission shall consider the rate or rates charged by the licensee or its affiliated corporations for power produced hereunder and sold without state.

Section 6(f). Under all licenses, excepting those of railroad corporations licensed solely for their own use, the reasonable needs for electric power and energy on part of the state and consumers in this state who can reasonably be served by the licensee shall have preference as compared with the needs of others, and the commission shall have power to enforce this provision by appropriate orders.

WISCONSIN STATUTES 1931

Section 31.27. Adequate service; reasonable rates. Upon complaint by any party affected, setting forth that any grantee of a permit to develop hydraulic power and generate hydroelectric energy for sale or service to the public is not furnishing citizens of this state with adequate service at a reasonable rate in consequence of

sales of such energy outside of the state, the commission shall have power to declare any or all contracts entered into by said grantee for such sales null and void in so far as they interfere with such service or rate. Such declaration shall be made only after a hearing and investigation and a recorded finding that convenience and necessity require the sale of a specified part or all such energy within this state.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY,

Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, THE STATE OF NEW HAMPSHIRE, NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, THE COMMONWEALTH OF MASSACHUSETTS, AND THE STATE OF RHODE ISLAND,

Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF JURISDICTIONAL STATEMENT

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February 1981

No. 80-1208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY,
Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *et al.*
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rules 36 and 42 of the Rules of this Court, the Edison Electric Institute ("EEI") respectfully moves this Court for leave to file the brief *amicus curiae* annexed hereto.[1]

Interest of Amicus Curiae

EEI is the national association of investor-owned electric utility companies in the United States.[2] Its members serve 99.1% of all customers of the investor-owned segment of the utility industry and 77.1% of the nation's electricity users. The decision by the New Hampshire Supreme Court

1. While the other parties have consented to the filing of this brief *amicus curiae*, the New Hampshire Public Utilities Commission, the State of New Hampshire, and the New Hampshire Legislative Utility Consumers' Council have not consented to the filing of this brief. Letters from the consenting parties have been filed with the Clerk of this Court.

2. The positions expressed herein, and in the appended brief *amicus curiae*, are those of the EEI members generally. Public Service Company of New Hampshire disassociates itself from the positions expressed herein and in the appended brief.

intimately concerns two matters of vital interest to EEI and its members: the revival of state constraints on the interstate generation and transmission of electricity,[3] and the disruption of the comprehensive federal regulatory scheme for regulation of wholesale electric rates. Because the interest of public utilities nationwide is not represented by any party to this action, EEI seeks this Court's permission to represent this crucial interest through the annexed brief.

The decision below allows the State of New Hampshire to withhold from the citizens of other states the economic benefit of hydroelectric resources located in New Hampshire. For many years, the low-cost electric energy produced from these resources has flowed throughout the New England interconnected electric systems interchangeably with the other electric energy produced in New Hampshire and in all other New England states. If upheld, the decision below will disrupt wholesale rates and power pooling arrangements currently approved by the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act and will cause the wholesale costs of electric energy in the other New England states to increase.

More importantly, from a national viewpoint, the decision below supports simple protectionism by individual states of electric energy resources and thus poses considerations broader than those of immediate concern to the parties in the present case. This nation's basic indigenous energy resources – coal, oil, gas, uranium, and water power -- are not uniformly distributed; some states are better endowed than others. If the decision below is allowed to stand, other states will be encouraged to use existing legislation or to adopt new legislation to join New Hampshire in the practice of hoarding the benefits of energy and fuel

3. *See, e.g., Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Company*, 273 U.S. 83 (1927); *c.f., West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

supply resources so vitally important to reliable and economic energy supplies nationwide.[4] Other energy-rich states will be encouraged to withhold the economic benefits of their energy resources from the citizens of less fortunate states. Those states deprived of such benefits will be tempted to react insofar as they are able to do so, if only to offset otherwise increased energy rates. The decision below will give rise to construction of the very barriers to commerce which the Commerce Clause has prevented.

As a national association, EEI is in a position to reflect a broader spectrum of interest and impact than the parties herein. The present case impacts upon the public interest of all citizens affected by the regulation of electric utilities, as well as upon the national economic interest in the reliability and equitable availability of national energy resources. The annexed brief *amicus curiae* demonstrates from a national perspective the extent of this impact and seeks to assist the Court to weigh the public interest in noting probable jurisdiction herein.

4. *See, e.g., Commonwealth Edison Company* v. *Montana*, No. 80-581, probable jurisdiction noted, ___ U.S. ___, 49 U.S.L.W. 3428 (Dec. 9, 1980) (state coal severance tax).

Conclusion

For the reasons set forth above, and in the annexed brief, EEI requests leave to file the annexed brief as *amicus curiae*.

Respectfully submitted,

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QUESTIONS PRESENTED

Acting under an archaic 1913 state statute never before invoked for this purpose, the New Hampshire Public Utilities Commission ("PUC") prohibited New England Power Company ("NEP") from continuing to sell outside the state energy generated by NEP at its federally-licensed hydroelectric projects in New Hampshire. NEP has appealed from a judgment of the New Hampshire Supreme Court upholding the state statute as applied by the PUC. The questions presented by this appeal are:

1. Does the application of the New Hampshire statute to bar the export of hydroelectric energy from the state constitute an impermissible burden on interstate commerce in violation of the Commerce Clause of the United States Constitution?

2. Does the use of the New Hampshire statute to force NEP to file with the Federal Energy Regulatory Commission to reduce wholesale rates to New Hampshire customers violate the Federal government's exclusive jurisdiction over wholesale sales of electricity in interstate commerce?

PARTIES TO THE PROCEEDING BELOW

All of the parties appearing before the New Hampshire Supreme Court are listed in the caption.

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No. 80-1208

IN THE

Supreme Court of the United States

October Term, 1980

NEW ENGLAND POWER COMPANY,

Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *et al.*,

Appellees

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF JURISDICTIONAL STATEMENT

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of the jurisdictional statement filed by Appellant New England Power Company ("NEP") on January 19, 1981 ("NEP Jurisdictional Statement") in the captioned appeal from a judgment of the New Hampshire Supreme Court entered on December 23, 1980, upholding the validity of a New Hampshire statute as applied by the New Hampshire Public Utilities Commission ("PUC") to bar the export of hydroelectric energy generated within the state.[1]

1. The positions expressed herein are those of the EEI members generally. Public Service Company of New Hampshire disassociates itself from the positions expressed herein.

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court (Appendix A to the NEP Jurisdictional Statement, pp. 1a-14a ("NEP App. A")) is not yet reported. The PUC's Report and Order dated August 27, 1980 (Appendix B to the NEP Jurisdictional Statement, pp. 15a-24a ("NEP App. B")) and its Report and Order dated September 19, 1980 (Appendix C to the NEP Jurisdictional Statement, pp. 25a-40a ("NEP App. C")) are also unreported.

JURISDICTION

This Court has jurisdiction, under 28 U.S.C. § 1257(2), of this appeal from a judgment of the New Hampshire Supreme Court, because that Court upheld the validity of a state statute as applied by the PUC against claims that the statute violates both the Constitution and the laws of the United States. Judgment was deemed to have been entered on December 23, 1980, when the decision of the New Hampshire Supreme Court was docketed by its clerk. A notice of appeal was timely filed on January 12, 1981 (Appendix D to the NEP Jurisdictional Statement, p. 41a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case challenges the validity of the New Hampshire hydroelectric export statute (NH RSA 374:35), as applied, under the Federal Power Act (16 U.S.C. §§ 792-824k) and the Commerce Clause of the United States Constitution (art. I, § 8, cl. 3).

The text of NH RSA 374:35 is set out at page 2 of the NEP Jurisdictional Statement, the relevant provisions of Federal Power Act, in Appendix E, pp. 42a-46a, thereof, and the Commerce Clause is set out at page 3 of the NEP Jurisdictional Statement.

INTEREST OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute is the national association of investor-owned electric utility companies, including most of the utility companies serving New England. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and supply 77.1 percent of the nation's electricity. In order to serve these customers reliably, EEI's members are interconnected in a complex national network linking 47 of the 48 continental states. As discussed in the foregoing Motion for Leave to File, the decision of the New Hampshire Supreme Court from which this appeal is taken concerns vital interests of EEI and its members – unencumbered access to the nation's energy and fuel supplies and the ability of the nationwide electrical network to function reliably, efficiently and economically to meet the electrical demands of all customers.

STATEMENT OF THE CASE

The salient features of the decisions below are described in the Statement of the Case presented in the NEP Jurisdictional Statement at pages 3 to 7. That description need not be repeated here.

The consequences of the decision below are not limited to the named parties. The decision has serious implications for interstate power transactions nationwide. Interstate power transactions are a major component of the complex pattern of utility industry coordination for reliability and economy, which includes the formal and informal coordination of transmission and generation facilities, through state and regional power pools and regional electric reliability councils. *The 1970 National Power Survey*, Part I, Chapter 17 (Federal Power Commission, 1970). Indeed, electrical facilities in all states in the continental United States, with but one exception, are interconnected across state lines to form complex interstate networks. All of the New England states are electrically interconnected and

bulk electric supply is coordinated through a single, centrally-controlled network known as NEPOOL.[2] (NEP App. A, p. 3a).

Transactions at wholesale among the interconnected systems are regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to Part II of the Federal Power Act. Should each state seek instead to exploit its parochial interests in local energy supplies and restrict these transactions, directly or indirectly, this interconnected network, so vital to reliable and economical electrical service, would collapse. The resulting deterioration in reliability of electric service and increases in costs to the customers are detrimental to the interests of utilities and of their customers throughout the nation, and ultimately, to the states themselves.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Regardless of how it is rationalized, NH RSA 374:35, as applied, has an impermissible effect. The PUC purported to withdraw permission for NEP to "transmit hydroelectric energy from within the boundaries of the State" (NEP App. C, p. 40a) and directed NEP to sell that energy within the state "to enable New Hampshire to regain the benefit of its hydroelectric power"[3] (NEP App. A, p. 14a). The PUC's application of NH RSA 374:35 can have only one of two meanings: either it is a ban on exports or it is a direction to NEP to provide favorable wholesale rates to New Hampshire customers. Therefore, NH RSA 374:35 is

2. As this Court has recognized, such power-pooling arrangements confer significant benefits, in terms of reliability and cost of service, on their participants. *See Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S. 515, 519 (1971).

3. The use of the phrase "its hydroelectric power" is no longer warranted, because the hydroelectric energy generated by NEP is produced at federally-licensed projects located on a navigable river. *See First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 180 (1946).

either repugnant to the Commerce Clause, or it is an impermissible attempt by the state to intrude upon exclusive federal jurisdiction to set wholesale rates under Part II of the Federal Power Act.

Moreover, given the interconnected nature of the New England electrical network, which includes New Hampshire, no "exportation of hydroelectric energy" within the meaning of § 201(b) of the Federal Power Act has been shown to be present on the facts of this case.

1. New Hampshire's attempt to prevent the interstate transmission of electricity violates the Commerce Clause.

As this Court explained in *Hood & Sons* v. *DuMond*, 336 U.S. 525, 537-8 (1949), "this principle that our economic unit is the Nation . . . has as its corollary that the states are not separable economic units." This analysis is uniquely appropriate in this case, which involves the generation and transmission of electricity. Forty-seven of the 48 continental states are electrically interconnected.[4] More importantly, all of New England – including New Hampshire – is electrically interconnected into a single network known as NEPOOL, and all generation in the grid is centrally dispatched as a single system.[5] In short, New Hampshire is not a separable unit electrically or economically.

In order to "regain" the economic benefit of hydroelectric energy generated within New Hampshire's borders, the PUC withdrew permission, for the first time in the 67 years since NH RSA 374:35 was enacted, for NEP "to transmit hydroelectric energy from within the boundaries of the

4. *See Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453, 471 (1972) (Douglas, J., dissenting).

5. *See New England Power Pool Agreement*, Opinion 775 (FPC, 1976). Nowhere in their opinions do the New Hampshire Supreme Court or PUC mention, much less quantify, the economic benefits New Hampshire consumers derive from NEPOOL's economic dispatch system, or from the outside system support and increased reliability which NEPOOL provides to New Hampshire and its citizens.

State." (NEP App. C, p. 40a). The New Hampshire Supreme Court upheld this application of the statute. (NEP App. A, pp. 12a, 14a).

This is "simple economic protectionism." *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). It is invalid *per se*. *Id.* "The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." 437 U.S. at 624. This is precisely what the application of NH RSA 374:35 has been used to accomplish in this case.

NH RSA 374:35 on its face and in practical effect discriminates against interstate commerce. *See Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979). Far from regulating "even-handedly with only 'incidental' effects on interstate commerce," the intended effect of NH RSA 374:35 is to choke off interstate commerce to capture an economic benefit for New Hampshire residents.

Although there is, therefore, no reason even to undertake the further analysis spelled out in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (and *see Hughes* v. *Oklahoma*, *supra*, at 336), such an analysis demonstrates that, as applied, NH RSA 374:35 serves no legitimate purpose. The PUC stated "the public good can be advanced by achieving goals such as providing electric service at the lowest possible cost, and achieving a fair distribution of limited natural resources." (NEP App. C at 35a). The former reason is parochial protectionism and is an illegitimate attempt to isolate New Hampshire from the national economy. *Philadelphia* v. *New Jersey*, *supra*, at 624. The latter is an attempt to afford New Hampshire residents a "preferred right of access over consumers in other States to natural resources located within its borders." This is impermissible. *Philadelphia* v. *New Jersey*, *supra*, at 627; *Hughes* v. *Oklahoma*, *supra*, at 338; *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

> It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.

Philadelphia v. *New Jersey, supra*, at 628. The problems to which NH RSA 374:35 was applied are common to all states where electricity is used. Therefore, NH RSA 374:35, as applied, violates the Commerce Clause.[6]

2. New Hampshire cannot use NH RSA 374:35 to force the FERC to establish new wholesale rates.

Although it sought strenuously to characterize the PUC's application of NH RSA 374:35 as something other than wholesale ratemaking,[7] the New Hampshire Supreme Court could not ignore the reality of the situation:

> Its [NH RSA 374:35] purpose is to give New Hampshire the benefit of that power of which its residents now only get about six percent.
>
> • • •
>
> Rates to New Hampshire consumers are higher due to the lack of access to New Hampshire's major hydroelectric stations' output; the dollar savings to New Hampshire consumers, if the power is sold within this State, would be substantial.

6. Section 201(b) of the Federal Power Act is not an independent source of state power in this area. Rather, as this Court stated in an analogous context involving § 7 of the Bank Holding Company Act, 12 U.S.C. § 1846, it merely defines "the extent of the federal legislation's preemptive effect on state law . . . [and] applies only to state legislation that operates within the boundaries marked by the Commerce Clause." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S 27, 48 U.S.L.W. 4638, 4644 (June 9. 1980). As applied, NH RSA 374:35 operates completely outside those boundaries.

7. "This is not a control of rates but rather a control of the assignment of the power." (NEP App. A, p. 12a).

(NEP App. A, pp. 11a, 13a). *Indeed, the New Hampshire Supreme Court went so far as to remand the matter for NEP to make appropriate rate filings to implement NH RSA 374:35.* (NEP App. A, p. 14a).

Under Part II of the Federal Power Act, the Federal Energy Regulatory Commission has plenary jurisdiction over all wholesale sales of electricity in interstate commerce except those "made explicitly subject to regulation by the States." *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 216 (1964) (*"City of Colton"*). The states have no power to regulate sales such as NEP's sales at wholesale. *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Company*, 273 U.S. 83 (1927) (*"Attleboro"*).

> Part II is a direct result of *Attleboro*. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales.

United States v. *Public Utilities Commission of California*, 345 U.S. 295, 311 (1953).

Thus, New Hampshire has no power to regulate wholesale sales of electricity. NEP's sales are clearly and admittedly (NEP App. A, p. 3a) wholesale sales in interstate commerce. *City of Colton, supra*, at 215-6. New Hampshire cannot regulate the rates for such sales directly or indirectly. *United States* v. *Public Utilities Commission of California, supra*, at 311. New Hampshire's attempt to apply NH RSA 374:35 to force NEP to file new rates with FERC, as "appropriate," reflecting a new cost base forced upon NEP by depriving it and its customers in other New England states of low-cost hydroelectric energy is nothing more than

an impermissible attempt to accomplish by indirection what the state is powerless to achieve directly.

Section 201(b) of the Federal Power Act[8] does not create an exception to this rule; nor is its application even appropriate to the facts of this case.

Section 201(b) was not drafted with state rate regulation in mind. *United States* v. *Public Utilities Commission of California, supra,* at 301, n.4. Section 201(b) is not a grant of jurisdiction.[9] *Id.* at 304. Rather, it assumed and did not pass upon the validity of those laws to which it referred. However, such laws as NH RSA 374:35 are valid only insofar as they operate within the Federal Power Act itself or within the limits of the Commerce Clause. *Lewis* v. *BT Investment Managers,* 447 U.S. 27, 48 U.S.L.W. 4638 (June 9, 1980). Similarly, although § 20 of the Federal Power Act was asserted to allow states to regulate rates for power sold from federally licensed projects, this Court found that § 20 was not a grant of state jurisdiction, but merely assumed the existence of a state power later shown not to exist. *U.S.* v. *Public Utilities Commission of California, supra,* at 304. As with § 20, later cases show that NH RSA 374:35, as applied, cannot operate consistently with the plenary federal jurisdiction over wholesale sales. *City of Colton, supra.*

In any event, § 201(b) has not been demonstrated to be applicable to the facts of this case. The reference in § 201(b) to the "exportation" of hydroelectric energy requires the tracing of electricity from a particular generating source.

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8. Section 201(b), 16 U.S.C. § 824(b), provides in relevant part:
The provisions of this Part [II] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.

9. *Cf. First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152, 177 (1946) (comparing §§ 9(b) and 27 of the Federal Power Act).

Although this concept may have had technological validity when § 201(b) was enacted and before the full development of today's complex interstate grid (*see, e.g., Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61 (1943); and *United States* v. *Public Utilities Commission of California, supra,*, at 302), the tracing of electricity to its source on an interconnected system is technically impossible and has since been disavowed as a legal concept by this Court. *Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972). Federal jurisdiction over electricity follows the inextricably mixed flow of electrons rather than a constructive legalistic test. *City of Colton, supra,* at 209 n.5. The NEP hydroelectric energy flows directly into and is dispatched by the NEPOOL system, which includes Public Service Company of New Hampshire, the principal retail supplier in the State. (NEP App. A, p. 4a). Even if it were possible or appropriate to trace this energy, there is no evidence that any hydroelectric energy actually leaves New Hampshire. In short, the concept of exportation envisioned in 1913 ignores the realities of the modern interconnected interstate electrical system of which New Hampshire is a part.[10]

10. Indeed, the New Hampshire Supreme Court recognized this fact when it characterized this case as "a control of the assignment of the power." (NEP App. A, p. 12a).

CONCLUSION

For the foregoing reasons as well as those expressed by NEP in its Jurisdictional Statement, the Court should, if it does not summarily reverse, note probable jurisdiction.

Respectfully submitted,

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NEW ENGLAND POWER POOL EXECUTIVE COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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MOTION FOR LEAVE TO FILE BRIEF OF THE NEW ENGLAND POWER POOL EXECUTIVE COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

The New England Power Pool Executive Committee hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* in this case. The consents of the Appellant and of two of the Appellees, the Commonwealth of Massachusetts and the State of Rhode Island, have been filed with this Motion. The other Appellees, the New Hampshire Public Utilities Commission, the State of New Hampshire, and the New Hampshire Legislative Utility Consumers' Council, have refused to consent to the filing of the brief as *amicus curiae*.

The New England Power Pool ("NEPOOL") is comprised of 78 private and public electric utilities which serve customers in the six New England states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.[1] Through NEPOOL, the participant utilities[2] have agreed to interconnect and coordinate the operation of their generation and transmission facilities in order to assure conformance to proper standards of electric service reliability and to attain maximum practicable economy in regional electric bulk power supply. Electric utilities participating in NEPOOL own and control substantially all of the bulk electric generation and transmission facilities in the six New England states. All NEPOOL activities are performed without regard to the boundaries of the New England states. Pursuant to the NEPOOL arrangements, the electric generating units of the participant utilities are centrally dispatched by the pool on the basis of maximum practicable economy, without regard to ownership. Electric energy generated by those units flows freely over the interconnected network of transmission facilities which is owned and operated by the NEPOOL participants in each of the New England states. In addition to coordinated operation, the NEPOOL arrangements provide for joint reliability review and planning of the bulk electric generating and transmission facilities needed to meet future customer needs throughout the region. NEPOOL is generally considered to be the most comprehensive electric power pooling arrangement in the United States. Economic Regulatory Administration, U.S. Dept. of Energy, *Power Pooling: Issues and Approaches* 1.23 (1980).

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1. This Motion and the accompanying Brief are filed on behalf of all NEPOOL participant utilities except Public Service Company of New Hampshire ("PSNH"). PSNH has requested the NEPOOL Executive Committee to inform the Court that PSNH is not joining in the Motion or Brief.

2. The NEPOOL participants, including the Appellant, are listed in Exhibit A of this Motion and Brief.

The New Hampshire statute and the order of the New Hampshire Public Utilities Commission ("PUC") at issue in this case will interfere with the operation of this interstate power pool. Indeed, the first question presented on appeal is whether the New Hampshire law and PUC order contravene the Commerce Clause of the United States Constitution. NEPOOL's presentation of the facts and law relative to the interstate commerce aspect of this case will supply the Court with information and legal argument either omitted or mentioned only in passing in the Jurisdictional Statement and the Motions to Dismiss or Affirm.

The second and third questions on appeal deal with the preemption of the New Hampshire statute and PUC order by federal law. A part of that federal law, particularly well known to NEPOOL, deals with regional pooling of electricity through pools operating as NEPOOL does in New England. Thus, in the exposition of facts and law which are relevant to this aspect of the preemption question, NEPOOL is uniquely situated to aid the Court in its evaluation of the importance of the questions presented on appeal.

The NEPOOL Executive Committee therefore urges that leave be granted to file the accompanying brief as *amicus curiae* and respectfully so moves this Court.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*

The interest of the New England Power Pool ("NEPOOL") Executive Committee in this case is set forth in the accompanying Motion by the NEPOOL Executive Committee for leave to file a brief as *amicus curiae*.

SUMMARY OF ARGUMENT

The basic question in this appeal is the validity of New Hampshire's hydroelectricity export statute, N.H. R.S.A. 374:35, and of an order of the New Hampshire Public Utilities Commission ("PUC") issued pursuant to that statute. Taken together, the statute and order could substantially impede the multi-state cooperative effort of NEPOOL to assure the reliability of electric service and to minimize the cost of electricity in all of the New England states. The statute and order also undermine the federal regulatory scheme pursuant to which electric pooling operations are conducted in the six-state New England region.

ARGUMENT

Although the New Hampshire statute appears to contemplate control over the physical movement of electric energy in order to assure its availability for use within that state, the challenged PUC order does not act to restrict the movement of electric energy produced by the Connecticut River hydroelectric plants owned by New England Power Company ("NEP"). The NEPOOL Executive Committee therefore understands that the electric energy from these hydroelectric plants will continue to be generated subject to NEPOOL dispatch and that such energy will be delivered into the regional transmission network controlled

by NEPOOL. Based upon this understanding, the NEPOOL Executive Committee at this time has no reason to believe that the central dispatch of generating and transmission facilities by NEPOOL will be affected by the PUC order. Nevertheless, the PUC order does threaten achievement of the pool's goals of assuring a reliable bulk power supply for the New England region while attaining maximum practicable economy.

The NEPOOL arrangements are structured to achieve the pool's objectives through a number of activities in addition to the central dispatch of the region's bulk electric power facilities. Thus, the NEPOOL arrangements provide for sharing of the savings achieved by pool energy interchange transactions, joint participant facility planning, maintenance of minimum generating reserves, joint cooperation in environmental matters, and coordinated construction, operation and maintenance of the electric generation and transmission facilities owned or controlled by the pool participant electric utilities.

The PUC order will have the significant adverse effect on interstate commerce of discouraging coordinated planning and construction of electric generation and transmission facilities on a regional basis. The New England region, although relatively small, is divided into six states, which are served by a larger number of relatively small electric utilities. In order to conserve resources and to secure for their customers the economies of large-scale facilities, New England electric utilities have for many years worked together in the joint planning and joint ownership of generating units. For example, electric utilities from each of the six New England states are owners of interests in regionally-sized nuclear generating plants constructed, or under construction, in Maine, Ver-

mont, Connecticut, Massachusetts and New Hampshire.

While the jointly planned and owned facilities in New England to date have typically not included hydroelectric facilities, future large-scale conventional or pumped storage hydroelectric plants are very likely to be approached on a regional basis. Pumped storage generating plants are large hydroelectric projects which are frequently constructed and operated to complement nuclear generating plants. Two of these large-scale hydroelectric facilities already serve the New England region, having been constructed in Massachusetts by NEPOOL participants. If the challenged PUC order is allowed to stand, electric ratepayers in Massachusetts and Rhode Island, who have for many years supported the costs of NEP's hydroelectric plants in New Hampshire through their rate payments, will no longer continue to receive the economic benefits of lower cost electric energy produced by these plants. It is obvious that New Hampshire's action, if it is permitted to stand, will effectively inhibit NEPOOL participant electric utilities in any other state from participating in future conventional hydroelectric or pumped storage facilities located in New Hampshire.

The New Hampshire order is likely to affect adversely the joint planning and construction of major facilities other than hydroelectric plants. If allowed to stand, New Hampshire's action will act as an incentive to the other New England states to secure exclusive benefits for their citizens from the location of generation and transmission facilities in those states. State utility regulatory bodies will be unwilling to permit electric utilities subject to their jurisdiction to invest in the ownership of generating plants in another state when there is any risk that the output of such plants may be required to be sold to customers in the other state and therefore be of no benefit to the retail ratepayers of the owner utility.

The challenged PUC order will also interfere with the NEPOOL arrangements in areas other than regional planning. The pool arrangements assume that the generating facilities of each participant will be first utilized to serve the electric needs of that utility's customers. Any surplus capacity is then available to be shared by the other pool participants. For example, the electric energy produced by NEP's Connecticut River hydroelectric plants is presently considered to be first used to meet the electric service requirements of NEP's customers. Thus, the PUC order effectively destroys a basic premise of pool economics.

The adverse effect of the order on NEPOOL economic arrangements encompasses reserve obligations as well as energy transactions. If NEP is required to sell the electric output of its Connecticut River hydroelectric plants within New Hampshire, the capacity of those generating plants will no longer be considered to be available to meet the capacity requirements of customers which NEP is obligated to serve in Massachusetts and Rhode Island. NEP's responsibility to have specific amounts of electric generating capacity will not be changed, but the capacity available to meet its NEPOOL obligations will be reduced by approximately 420 megawatts. Therefore, NEP's capacity planning within the NEPOOL framework will be jeopardized.

In addition to interfering with the operation of specific pool arrangements, New Hampshire's challenged action imperils NEPOOL by threatening the cooperative spirit which has been essential to the formulation and operation of a comprehensive regional pool. The NEPOOL arrangements are the result of an extraordinary consensus among the electric systems throughout the six New England states (large and small, rural and urban, publicly-owned and

privately-owned). These utilities recognized that through cooperative efforts they could secure their common primary goals of more reliable and less expensive electric service for their customers throughout the six-state region. NEPOOL also owes its existence and successful operation to the cooperative efforts of the governmental authorities of each of the six New England states.

The challenged PUC order imperils the environment of state cooperation which is needed to support NEPOOL. The utilities participating in NEPOOL are each owned by subdivisions of the states or have the conduct of their electric businesses dependent upon state grants of authority and favorable state regulation. If the PUC order is allowed to stand, other states will almost certainly consider efforts to secure comparable short-term economic benefits for their citizens. As each of the New England states seeks to engage in a competitive effort to secure economic advantage or redress, the cooperative foundation of NEPOOL's delicately balanced structure of interconnection and coordination arrangements may well be destroyed.

If the challenged PUC order is allowed to interfere with the NEPOOL arrangements, the adverse effects will have both regional and national significance. Congress has repeatedly recognized a special national interest in the transmission and sale of electric energy between the states. Voluntary regional electric pools, such as NEPOOL, have been expressly recognized by Congress as the appropriate organizational arrangement for securing the objective of assuring an abundant national supply of electric energy with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. Federal Power Act, Section 202(a), 16 U.S.C. § 824a(a).

The NEPOOL arrangements were filed with the Federal Power Commission ("FPC"), predecessor to the Federal

Energy Regulatory Commission. NEPOOL was thereafter the subject of an extensive investigation under Part II of the Federal Power Act. *New England Power Pool Agreement, Opinion* Nos. 775, 775-A (FPC 1976), *aff'd sub nom., Municipalities of Groton v. Federal Energy Regulatory Commission*, 587 F.2d. 1296 (D.C. Cir. 1978). The FPC expressly determined that the NEPOOL arrangements conform to the mandates of the Federal Power Act and other applicable federal statutes. In particular, the FPC found that the NEPOOL arrangements advance the national policy of promoting and encouraging regional interconnection and coordination of electric facilities for the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. *New England Power Pool Agreement*, Initial Decision, FPC Docket No. E-7690 at 9-11 (1975), *modified on other grounds*, Opinion No. 775 (1976); Federal Power Act, Section 202(a), 16 U.S.C. § 824a(a). New Hampshire's challenged effort to secure for its citizens the exclusive economic benefit of hydroelectric energy generated within that state jeopardizes attainment of these national policies through NEPOOL, and clearly presents important federal questions.

CONCLUSION

This case presents important federal questions regarding the constitutional prohibition of interference by the states with interstate commerce and concerning the preemption of the New Hampshire law and PUC order by

federal law. No decision of this Court has addressed these questions. Probable jurisdiction should be noted.

Respectfully submitted,

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EXHIBIT A

LIST OF NEPOOL PARTICIPANTS

Allied Power and Light Company
Town of Ashburnham Municipal Light Plant
Bangor Hydro-Electric Company
Blackstone Valley Electric Company
Boston Edison Company
Town of Boylston Municipal Light Department
Town of Braintree Electric Light Department
Burlington Electric Light Department
Cambridge Electric Light Company
Canal Electric Company
Central Maine Power Company
Central Vermont Public Service Corporation
City of Chicopee Municipal Lighting Plant
Citizens Utilities Company
The Connecticut Light and Power Company
Connecticut Municipal Electric Energy Cooperative
Town of Danvers Electric Department
Eastern Edison Company
Village of Enosburg Falls
Fitchburg Gas and Electric Light Company
Town of Georgetown Municipal Light Department
Granite State Electric Company
Green Mountain Power Corporation
Town of Groton Electric Light Department
Village of Harwick Electric Department
The Hartford Electric Light Company
Town of Hingham Municipal Lighting Plant
Town of Holden Municipal Lighting Plant
City of Holyoke Gas & Electric Department
Holyoke Power and Electric Company
Holyoke Water Power Company
Hudson Light and Power Department
Town of Hull Municipal Light Department
Village of Hyde Park
Town of Ipswich Municipal Electric Department
Village of Johnson
Town of Littleton Electric Light & Water Department
Village of Ludlow Electric Light Department
Village of Lyndonville

Town of Mansfield Municipal Electric Department
Town of Marblehead Municipal Light Department
Massachusetts Electric Company
Massachusetts Wholesale Electric Company
Town of Middleborough Gas & Light Department
Town of Middleton Municipal Electric Department
Montaup Electric Company
Village of Morrisville Water & Light Department
The Narragansett Electric Company
New Bedford Gas and Edison Light Company
New England Power Company
Newport Electric Corporation
Town of North Attleborough Electric Department
Village of Northfield
Village of Orleans
Pascoag Fire District
Town of Paxton Municipal Light Department
City of Peabody Municipal Light Plant
Princeton Municipal Light Department
Public Service Company of New Hampshire
Town of Reading Municipal Light Department
Village of Readsboro
Rochester Electric Light & Power Company
Town of Shrewsbury Electric Light Plant
Town of South Hadley Electric Light Department
Town of Sterling Municipal Electric Light Department
Village of Stowe
Village of Swanton
Taunton Municipal Lighting Plant
Town of Templeton Municipal Lighting Plant
The United Illuminating Company
Vermont Electric Co-op, Inc.
Vermont Electric Power Company, Inc.
Vermont Marble Company
Town of Wakefield Municipal Light Department
Washington Electric Cooperative, Inc.
Western Massachusetts Electric Company
Town of West Boylston Municipal Lighting Plant
City of Westfield Gas and Electric Light Department

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No. 80-1208

In the Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY, APPELLANT

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

QUESTION PRESENTED

Whether a state statute that prohibits the transmission or sale of hydroelectric power generated in that state to other states without the authorization of the State Public Utility Commission, is preempted by the Federal Power Act and therefore violates the Supremacy Clause of the Constitution.

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INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

Part I of the Federal Power Act (16 U.S.C. (& Supp. II) 791a *et seq.*) accords the Federal Energy Regulatory Commission comprehensive licensing authority over the nation's water power resources in order to benefit interstate commerce. Part II of the Act gives the Commission regulatory rate-making authority over various aspects of the transmission and sale of electric energy in interstate commerce, including the transmission and sales from hydroelectric projects licensed under Part I.

This case presents an important question concerning the scope of permissible state authority within the federal regulation established by the Federal Power Act. Here, the New Hampshire Supreme Court held that a New Hampshire statute which prohibits the export of hydroelectric energy generated in that state, without the permission of the state public utility commission, was authorized by Section 201(b) of the Federal Power Act (16 U.S.C. (& Supp. II) 824(b)). The court's decision could have a substantial impact upon the Commission's future administration of the Act. If the decision below stands, the Commission will be required to administer the Federal Power Act in accordance with the terms and conditions placed by each state upon the transmission and sale in interstate commerce of electricity generated from the resources within that state. The United States and the Federal Energy Regulatory Commission believe that Congress did not intend the Commission's administration of the Federal Power Act

to be subordinated to such state administrative orders. Moreover, the New Hampshire court's decision sharply departs from the congressional policy to promote the regional pooling of energy producing resources, which the Commission has consistently encouraged in its attempts to provide nationwide coordination in the use of scarce energy resources. Thus, the United States and the Federal Energy Regulatory Commission have a substantial interest in this litigation.

STATEMENT

Appellant, New England Power Company (NEPCO), is a public utility which generates electric energy from six hydroelectric projects located on the Connecticut River in New Hampshire and Vermont. These projects are licensed by the Federal Energy Regulatory Commission under Part I of the Federal Power Act, 16 U.S.C. 792-823. The energy generated from the hydroelectric projects is transmitted and sold by NEPCO at wholesale in Massachusetts, Rhode Island, and New Hampshire in accordance with tariffs and rates approved by the Commission under Part II of the Federal Power Act, 16 U.S.C. (& Supp. II) 824-824k. Because NEPCO is a member of a highly-integrated regional power pool, which is operated as a single unit, the power it generates is transmitted throughout New England (J.S. App. 2a-3a).

On November 21, 1979, the New Hampshire Public Utilities Commission commenced an investigation under N.H. Rev. Stat. Ann. § 374:35 (1966 repl. ed.) to determine whether it should revoke its earlier approval of the exportation of electric power generated from appellant's hydroelectric facilities located in

New Hampshire. The state statute under which the Commission proceeded provides as follows:

> *Transmitting Electricity Out of the State Permission Required.* No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention to do so with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

After several hearings, the Public Utilities Commission withdrew the permission it previously had granted to appellant to transmit hydroelectric energy generated within New Hampshire outside the state (J.S. App. 2a). The New Hampshire Supreme Court upheld the state commission's order (J.S. App. 1a-14a). In so ruling, the court concluded that the Federal Power Act did not preempt the New Hampshire statute upon which the Commission based its order (J.S. App. 4a-8a). The court stated that the Commission's order did not conflict with the licensing power of the federal government under Part I of the Federal Power Act, 16 U.S.C. 792-823, because the

order "does not require compliance with [the state statute] as a condition precedent to securing a federal license under Part I" (J.S. App. 5a). In support of its conclusion, the court further observed that "New Hampshire has not sought to stop hydroelectric development of the Connecticut River and does not challenge the licenses granted to NEPCO over the years under Part I of the Federal Power Act" (*ibid.*).

The court further held that in Part II of the Federal Power Act, 16 U.S.C. (& Supp. II) 824-824k, Congress gave "express consent" (J.S. App. 11a) for the regulation prescribed by the New Hampshire statute. Although the court acknowledged that in enacting Part II of the Federal Power Act, Congress chose to fill the gap in the regulation of the interstate sale of electric power created by the constitutional limitations on state authority (see *e.g.*, *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 90 (1927)), it ruled that Section 201(b) of the Federal Power Act evidenced Congress' intention to allow the states to regulate in the manner provided by the New Hampshire statute. Pursuant to that provision, the Federal Power Act does not apply to intrastate sales of electric energy "or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line * * *" (J.S. App. 6a-7a).

DISCUSSION

In upholding the State Public Utility Commission's order directing that appellant no longer had permission to transmit hydroelectric power generated in New Hampshire to other states, the New Hampshire Court acknowledged that "it might be questionable,

in the absence of [Section] 201(b) of the Federal Power Act, that there would be authority for New Hampshire to interdict the flow of electricity that would otherwise continue to benefit two sister States * * *" (J.S. App. 10a). But Section 201(b) does not sanction such state parochialism at the expense of other states. Indeed, the Federal Power Act was designed to prevent such parochialism. Thus, the decision below presents important questions with respect to the scope and degree of preemption by the Federal Power Act over the transmission and sale of electrical energy in interstate commerce that warrant plenary review by this Court.

1. As this Court observed almost 40 years ago, the central thrust of Part I of the Federal Power Act was to promote the comprehensive development of water power, "in so far as it was within the reach of the federal power to do so." *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152, 180 (1946).[1] Section 23(b) of the Act, 16 U.S.C. 817(b), prohibits construction of nonlicensed hydroelectric projects on navigable streams, regardless of the effect on commerce, and further requires those proposing a project on a nonnavigable stream to file a declaration of intention and to come before the Federal Energy Regulatory Commission for a determination of whether the "interests of interstate or foreign commerce would be affected." By employing the standard "affect the interests of commerce, * * * Congress drew upon its full authority under the Commerce Clause." *FPC* v. *Union Electric Co.*, 381 U.S. 90, 96 (1965).

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[1] Part I of the Federal Power Act was enacted in 1920 as the Federal Water Power Act. See *FPC* v. *Union Electric Co.*, 381 U.S. 90, 91 n.2 (1965).

Section 10(a) of the Act, 16 U.S.C. 803(a), requires all licensed projects to be "* * * such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce * * *." The statute thereby undertakes "to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation * * *." *First Iowa Hydro-Electric Coop.* v. *FPC*, *supra*, 328 U.S. at 181. As the Court there stated in referring, *inter alia*, to the "comprehensive plan" standard of Section 10a, "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls" (*ibid.*; footnote omitted).

In Part II of the Federal Power Act, enacted in 1935, Congress authorized the Federal Energy Regulatory Commission (then the Federal Power Commission) to regulate the transmission and sale of electrical energy at wholesale in interstate commerce. This part of the statute was enacted in response to a series of decisions culminating in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), which had "denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.'" *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 214 (1964). With the growth of electric utilities which crossed state boundaries, Congress found it necessary to exercise federal authority to fill the regulatory gap created by *Attleboro*. See S. Rep. No. 621, 74th Cong., 1st Sess. 17 (1935); H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7-8 (1935). "Part II is a direct result of *Attleboro*. [The two] are to be read together. The

latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales." *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 311 (1953).

2. It is, therefore, plain that the decision below construing Section 201(b) of the Federal Power Act as authorizing New Hampshire to regulate the sale outside the state of hydroelectric power generated within New Hampshire is incompatible with the exclusive federal regulatory jurisdiction established by Part I of the Federal Power Act.

Here, appellant's six hydroelectric generating systems are licensed by the Federal Energy Regulatory Commission under Part I of the Federal Power Act. These licenses are issued on the condition, *inter alia*, that the project "* * * will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce * * *" (16 U.S.C. 803(a)). Hence, New Hampshire's proscription against the sale of power outside the state is squarely at odds with the federal policy upon which appellant's projects were licensed, viz., that these hydroelectric stations would benefit interstate commerce. To permit New Hampshire to bar the interstate sale of such power would vest it with a virtual "veto power over the federal project" and "would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal [Energy Regulatory] Commission." *First Iowa Hydro-Electric Coop.* v. *FPC*, *supra*, 328 U.S. at 164.

Contrary to the New Hampshire Supreme Court's suggestion (J.S. App. 5a), the fact that the state commission's order does not require compliance with

N.H. Rev. Stat. Ann. § 374:35 (1966 repl. ed.) as a condition precedent to obtaining a federal license under Part I does not save the order. That suggestion views Part I of the Federal Power Act much too narrowly. Part I does not simply authorize the federal authorities to grant licenses; it bespeaks a policy of benefitting interstate commerce and rests the licensing authority on that policy. Because the state commission's order thwarts that policy by attempting to retain all the benefits of the projects within New Hampshire, it cannot stand. As the Court stated in the closely analogous context of natural gas regulation, "although collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision that the orders must be declared a nullity to assure the effectuation of the comprehensive federal regulation ordained by Congress." *Northern Natural Gas Co.* v. *Kansas Commission*, 372 U.S. 84, 92 (1963).[2]

3. The New Hampshire Public Utilities Commission's order is also flatly at odds with Part II of the Federal Power Act. That portion of the statute, as we have explained (*supra*, pages 6-7), grants author-

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[2] Section 201(b) of the Federal Power Act, upon which the decision below relied (J.S. App. 4a-8a), does not undermine our submission that Part I of the Federal Power Act preempts the state commission's order. By its terms, Section 201(b) applies only to Part II of the Federal Power Act. But even if the "lawful authority" of the states over the exportation of hydroelectric energy preserved by Section 201(b) has any application to Part I of the Act, it is plain that the provision simply permits the states to license those projects on non-navigable streams that do not "affect" interstate commerce. Section 201(b) does not authorize state authority of the type involved in this case over what are projects indisputably located on a navigable waterway such as the Connecticut River.

ity to the Federal Energy Regulatory Commission over the interstate transmission and wholesale of electrical energy. The New Hampshire order invades that authority. By its terms, it withdraws permission for appellant to sell hydroelectric power generated in New Hampshire outside the state (see J.S. App. 2a). Since the energy generated in New Hampshire is dispatched through a regional power pooling system (NEPOOL) (see J.S. App. 3a), it would be impossible to comply with the literal terms of the state commission's order without elaborate alteration of the regional power transmission lines. Hence, the New Hampshire Supreme Court anticipated that compliance would be achieved by "arrangements" that "may naturally flow from the export termination" such as "new rates, contract modifications, or accounting adjustments" (J.S. App. 14a).[3]

It is of course settled since at least *Attleboro* that the states have no authority to set rates or to modify contracts with respect to the interstate transmission and wholesale of electrical energy. Part II of the Federal Power Act filled the regulatory gap, and, after declaring that "Federal regulation of [such] matters * * * is necessary in the public interest" (16 U.S.C. 824(a)), granted to the Federal Energy Regulatory Commission "jurisdiction over all facilities for such transmission or sale of electric energy" (16 U.S.C. (& Supp. II) 824(b)(1)). The teaching

[3] Thus, the New Hampshire Supreme Court construed the Public Utilities Commission's order as requiring that all of the economic benefits of the hydroelectric power—which is cheaper than electricity produced from oil-fired generators—must be assigned to New Hampshire consumers, rather than requiring that appellant terminate the transmission of power with the regional power pool (J.S. App. 11a-12a).

of *Attleboro* is that the states have no constitutional power to regulate interstate transmission and wholesales of electrical energy. Thus, in passing Part II of the Federal Power Act in 1935, Congress intended to "touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978); *Hines* v. *Davidowitz*, 312 U.S. 52, 66-67 (1941).

Section 201(b) of the Federal Power Act, upon which the decision below relied (J.S. App. 4a-8a), does not support New Hampshire's claim. It states that—

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not * * * deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line * * *.

The language of Section 201(b) makes clear that it is not, as the Supreme Court of New Hampshire mistakenly held, an affirmative grant of authority empowering the states to bar the exportation of hydroelectric energy. By its terms, it simply leaves standing, beyond the preemptive reach of the Federal Power Act, those constitutionally valid state laws that govern hydroelectric facilities. Thus, Section 201(b) does not sanction the flat prohibition against exportation of electrical energy involved in the instant case. It merely permits the states to continue to exercise whatever "lawful authority" that might exist under the Constitutional holding in *Attleboro*. To

conclude otherwise would vitiate the comprehensive federal regulation over the transmission and sale of electrical energy in interstate commerce contemplated by the Federal Power Act, in response to the *Attleboro* decision. This federal regulation begins at precisely the point at which state regulation was constitutionally limited by that decision. Thus, Section 201(b) was designed to preserve only such "lawful authority" of the states as was not barred by the interpretation of the Commerce Clause in *Attleboro*.[4]

At all events, Section 201(b) does not authorize the "new rates, contract modifications, or accounting adjustments, [that] may naturally flow from the export termination" (J.S. App. 14a) ordered by the state commission. Since Congress gave such ratemaking authority to the Federal Energy Regulatory Commission, it could not have intended to allow any state activity in this sphere as well. Hence, Section 201(b) is no justification for New Hampshire's attempt, through modification of contract rights and rate structures, to gain all of the economic benefits of its hydroelectric power at the expense of its regional neighbors.

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[4] Section 201(b) did not appear in the original Senate bill but was inserted in the House bill, as Congressman Rogers explained (see J.S. App. 7a), in order to insure that certain states were not deprived of rights which they then exercised over the exportation of hydroelectric energy transmitted across state lines. 79 Cong. Rec. 10527 (1935). While the House Report discusses this section of the bill, it does not indicate that the change from the Senate version of the bill was intended to be a substantive change. H.R. Rep. No. 1318, 74th Cong., 1st Sess. 27 (1935). See also *United States* v. *Public Utilities of California*, *supra*, 345 U.S. at 300-301 n.4.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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Nos. 80-1208, 80-1471 and 80-1610.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

NEW ENGLAND POWER COMPANY,
APPELLANT,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.,
APPELLEES.

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,
v.
NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL,
APPELLEE.

DENNIS J. ROBERTS II, ET AL.,
APPELLANTS,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.,
APPELLEES.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

Brief of Appellant New England Power Company.

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Probable Jurisdiction noted May 18, 1981.

Questions Presented

Invoking for the first time a 1913 state statute, the New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling outside the state any energy generated by NEP's federally-licensed hydroelectric projects in New Hampshire. The energy is currently delivered to an interstate transmission network and sold in three New England states including New Hampshire. These appeals are from a judgment of the New Hampshire Supreme Court upholding the state statute as applied by the PUC. The questions presented are:

1. (a) Whether the New Hampshire statute, under which the PUC has attempted to secure the economic benefits of hydroelectric energy generated within the state exclusively for the citizens of that state, unduly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.

(b) Whether Congress, in providing in Section 201(b) of Part II of the Federal Power Act that nothing in Part II "shall deprive" any state of "lawful authority now exercised" over hydroelectric energy exports, affirmatively granted New Hampshire the power to restrict such exports.

2. Whether Part I of the Federal Power Act, vesting comprehensive licensing authority in the Federal Energy Regulatory Commission ("FERC") over NEP's hydroelectric projects, preempts the state statute.

3. Whether Part II of the Federal Power Act, vesting exclusive jurisdiction in FERC over wholesale sales of electricity in interstate commerce, preempts the state statute as applied by the PUC to require NEP to modify its existing wholesale tariffs and contracts on file with FERC to effect a transfer of the economic benefits of the hydroelectric energy to New Hampshire citizens.

Parties to the Proceeding Below

The following parties appeared before the New Hampshire Supreme Court: New England Power Company; Commonwealth of Massachusetts; Dennis J. Roberts II, Attorney General of Rhode Island; Edward M. Burke, Administrator of the Rhode Island Division of Public Utilities and Carriers; the State of New Hampshire; and the New Hampshire Legislative Utility Consumers' Council.

Appellant New England Power Company is a wholly-owned subsidiary of New England Electric System, a registered holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 to 79z-6 (1976). Appellant is a parent of Connecticut Yankee Atomic Power Company, Maine Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation and Yankee Atomic Electric Company, and an affiliate of Granite State Electric Company, Massachusetts Electric Company, The Narragansett Electric Company, New England Energy Incorporated, and New England Power Service Company.

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In the Supreme Court of the United States.

OCTOBER TERM, 1980.

NEW ENGLAND POWER COMPANY,
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v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.,
APPELLEES.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

Opinions Below

The opinion of the New Hampshire Supreme Court (J.S. App. 1a-14a) is reported at ____ N.H. ____, 424 A.2d 807

(1980). The PUC's Report and Order dated August 27, 1980 (J.S. App. 15a-24a) and its Report and Order dated September 19, 1980 (J.S. App. 25a-40a) are unreported.[1]

Jurisdiction

This is an appeal from a final judgment of the New Hampshire Supreme Court upholding a New Hampshire statute as applied by the New Hampshire Public Utilities Commission to ban the export of hydroelectric energy generated within the state. The court rejected claims that the statute as so applied violates the Constitution and laws of the United States. Judgment was deemed to have been entered on December 23, 1980, when the decision of that court was docketed by its clerk. Notices of appeal were filed below on January 12, 1981 (J.S. App. 41a; No. 80-1610 J.S. App. 1a) and January 15, 1981 (No. 80-1471 J.S. App. 3a). The appeals were docketed on January 19, 1981 (No. 80-1208), February 27, 1981 (No. 80-1471) and March 23, 1981 (No. 80-1610). On May 18, 1981, this Court noted probable jurisdiction and consolidated the three cases. The Court has jurisdiction of these appeals under 28 U.S.C. § 1257(2) (1976).

Constitutional and Statutory Provisions Involved

This case raises questions concerning the validity of New Hampshire's hydroelectric export statute, N.H. Rev. Stat. Ann. § 374:35, under the Commerce and Supremacy Clauses of the United States Constitution, art. I, § 8, cl. 3 and art. VI,

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[1] "J.S. App." refers to the appendix to the Jurisdictional Statement in No. 80-1208.

cl. 2, and Parts I and II of the Federal Power Act, 16 U.S.C. §§ 792-824k (1976 & Supp. III 1979).

N.H. Rev. Stat. Ann. § 374:35 provides:

> **Permission Required.** No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

Article I, section 8, clause 3 of the United States Constitution provides:

> The Congress shall have Power
>
> . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ..

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties

made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The relevant portions of the Federal Power Act are set forth in an Appendix, *infra*, pp. 1a-9a.

Statement of the Case

This case involves an attempt by one state to secure the economic benefits of one of its natural resources exclusively for the advantage of its own citizens. The resource in question — hydroelectric energy — is currently delivered to a highly integrated, regional transmission network serving all of New England. The New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling the energy outside of New Hampshire. The immediate result of the order, if allowed to stand, will be higher electric rates for many Rhode Island and Massachusetts consumers and lower rates in New Hampshire.

A. Facts

NEP is a public utility which generates and transmits electricity at wholesale in interstate commerce. Its principal customers are three retail affiliates which resell the electricity at retail to over one million customers in Massachusetts, Rhode Island and New Hampshire. NEP also sells power at wholesale to some 30 non-affiliated utilities, the majority of which are municipal light departments serving cities and towns in Massachusetts. About 420 megawatts, or about ten percent, of

NEP's total generating capacity consists of hydroelectric units located within New Hampshire on the Connecticut River (Joint Appendix ["J.A."] 23a; Record, PUC Exhibit No. 6, Schedule 1). These units are all licensed by the Federal Energy Regulatory Commission, successor to the Federal Power Commission,[2] under Part I of the Federal Power Act (J.A. 11a).

NEP is a member of the New England Power Pool ("NEPOOL"), a highly integrated, regional power pool whose members own over 98 percent of the generation capacity and essentially all of the transmission facilities located in the six-state New England region (J.A. 30a). NEPOOL was organized to meet two specific objectives: to assure that the New England bulk power supply system meets proper standards of reliability, and to achieve the maximum practical economies in the operation of the regional system (J.A. 32a-33a).

NEPOOL members share in economies of scale made possible by coordinated planning and operation. Pool members frequently jointly plan and construct large generating units. Generating units are centrally dispatched on a regional basis. Members share generating reserves. Through access to a strong, interconnected transmission network or "grid," pool members are able to purchase shares in generating units throughout New England (J.A. 34a). NEPOOL is acknowledged as one of the most advanced and comprehensive power pooling arrangements in the United States. Economic Regulatory Administration, U.S. Department of Energy, *Power Pooling: Issues and Approaches* 1.23 (1980).

The key to the achievement of operational economies is centralized economic dispatch. All generating facilities throughout the six-state region are controlled by the NEPOOL dispatch center. The NEPOOL computer calculates the cost of

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[2]Both the Federal Energy Regulatory Commission and the Federal Power Commission will be referred to as "FERC" throughout this Brief.

generating electricity for each generating unit in New England and dispatches each unit to minimize the cost of the region's total electric power supply (J.A. 34a-35a). Hydroelectric generating units are dispatched by first taking into account the amount of water in the various rivers. The units are then scheduled to displace the most expensive generation by fossil-fired plants elsewhere in the region that would otherwise have to be run (J.A. 35a). Centralized dispatch means

> that the units are operated regardless of company ownership or geography and the transmission capability of the Pool allows power to flow in such a way that the total overall costs to the Pool are minimized.

(J.A. 34a-35a.) To distribute these savings, NEPOOL calculates how much it would cost each member utility to meet its own customers' load solely with its own generation. NEPOOL then bills each member that amount, less its share of the savings resulting from central dispatch (J.A. 50a). In 1979, NEPOOL dispatch saved the region over 44 million dollars compared to the costs that would have been incurred if each company had run on its own generation (J.A. 35a).

All of NEP's generating units, including its Connecticut River hydroelectric plants, are connected to the regional transmission network and operated under NEPOOL dispatch (J.A. 35a, 53a). All energy generated at the hydroelectric units flows freely in the transmission network throughout the six-state region. Once the hydroelectric units are dispatched by NEPOOL, it cannot be determined which customers the units physically serve (J.A. 53a). In short, the units are an integral part of a highly sophisticated, regional bulk power supply system operated without regard to state boundaries.

NEP's wholesale sales are comprehensively regulated by FERC under Part II of the Federal Power Act (J.A. 11a). The

costs and benefits of its hydroelectric units, as well as its other units, are allocated to its customers in Massachusetts, Rhode Island, and New Hampshire through rates and contracts on file with and approved by FERC. Because hydroelectric facilities have no fuel costs, NEP's Connecticut River plants produce electricity at a cost well below most other generating stations. These economic benefits are reflected in NEP's wholesale rates and shared by all of NEP's customers in the three-state region. Finally, the dispatch of NEP's units by NEPOOL is governed by an agreement investigated and approved by FERC under Part II (J.A. 12a-13a). *New England Power Pool Agreement*, 10 FPS 5-594 (1976), *aff'd sub nom. Municipalities of Groton v. Federal Energy Regulatory Commission*, 587 F.2d 1296 (D.C. Cir. 1978).

B. Proceedings before the PUC

Since 1913, New Hampshire has had in effect a statutory scheme — now codified in relevant part in N.H. Rev. Stat. Ann. § 374:35 ("the New Hampshire statute") — requiring utilities which operate hydroelectric units in New Hampshire to obtain permission from the PUC to transmit electricity to points outside New Hampshire. Prior to the instant proceeding, the PUC had never withheld such permission.

On November 21, 1979, the PUC instituted its first investigation under the statute to determine whether it should withdraw permission previously granted NEP to export hydroelectric energy generated at NEP's Connecticut River plants. In December 1979, NEP moved to dismiss the proceedings on the ground that the PUC lacked authority under the statute to prohibit the export of hydroelectric energy. NEP challenged the statute, as invoked by the PUC, on three federal grounds: (1) it would place an undue burden on interstate commerce; (2) it is preempted by FERC licensing authority over NEP's

hydroelectric projects under Part I of the Federal Power Act; and (3) it is preempted by FERC's regulation of NEP's wholesale sales under Part II of the Act.

The PUC deferred ruling on NEP's motion to dismiss and conducted hearings on the merits of an export restriction. Finally, on August 27, 1980, the PUC denied NEP's motion and held that the New Hampshire statute validly confers jurisdiction on the PUC to restrict hydroelectric exports (J.S. App. 15a-24a).

On September 19, 1980, the PUC issued its Report and Order on the merits (J.S. App. 25a-40a). The PUC withdrew permission to export hydroelectric energy and directed NEP to make arrangements to sell the energy solely to utilities or consumers within New Hampshire (J.S. App. 40a). The PUC did not, however, order NEP to prevent the energy from physically crossing state lines. Under the PUC's order, this hydroelectric energy will continue to be delivered to the regional transmission network; the economic benefits of the energy, however, will be confined to New Hampshire.

C. The Decision Below

NEP appealed the PUC's August 27 and September 19 orders to the New Hampshire Supreme Court, asserting the same federal constitutional and statutory challenges it had raised before the PUC. The court rejected NEP's federal claims and upheld the New Hampshire statute as applied by the PUC (J.S. App. 1a-14a).

The court concluded that the New Hampshire export statute as applied by the PUC did not run afoul of the Commerce Clause (J.S. App. 6a-8a, 10a-12a). In the court's view, Congress affirmatively granted the state authority to restrict hydroelectric exports by inserting a savings clause in Section 201(b) of Part II of the Federal Power Act, 16 U.S.C. § 824(b) (Supp. III 1979) (J.S. App. 7a-8a, 10a-11a).

The court also found no conflict between the New Hampshire statute as applied by the PUC and the regulatory schemes embodied in Parts I and II of the Federal Power Act. The court reconciled the PUC's order with FERC's exclusive jurisdiction under Part II over wholesale electric rates by characterizing the order as no more than an assertion of "control of the assignment of the power" (J.S. App. 12a). At the same time, however, the court acknowledged that to accomplish this reassignment "new rates, contract modifications, or accounting adjustments . . . may naturally flow from the export termination" (J.S. App. 14a).

The court remanded the case to the PUC for implementation, concluding:

> [NEP] must make appropriate adjustments and filings with the appropriate federal and State administrative agencies to enable New Hampshire to regain the benefit of its hydroelectric power.

Id. The PUC has not acted on remand pending resolution of these appeals by this Court.

Summary of Argument

A.

The Commerce Clause prevents a state from securing the economic benefits of its own resources exclusively for its own citizens. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). A state may not prevent a commodity from being sold in interstate commerce simply because the commodity is needed within the state. Where state restrictions on commerce are motivated by "simple economic protectionism . . ., a virtually per se rule of in-

validity has been erected." *Philadelphia v. New Jersey*, 437 U.S. at 624. The transmission and sale at wholesale of electric energy in interstate commerce is fully subject to the protections of the Commerce Clause. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

NEP's Connecticut River hydroelectric units are connected to the New England transmission network. The units are centrally dispatched by NEPOOL and electric energy from the units flows freely throughout the regional grid. The energy is therefore in interstate commerce. The express purpose of the PUC in issuing its order is to secure the economic benefits of NEP's hydroelectric generation exclusively for citizens of New Hampshire. Unless affirmatively authorized by Congress, the order directly burdens interstate commerce in violation of the Commerce Clause. And, contrary to the decision of the court below, Section 201(b) of the Federal Power Act does not provide such authorization.

The Court has recognized that while Congress can affirmatively grant states authority to regulate interstate commerce, it has done so only rarely, and by using language that is affirmative, prospective and specific. Traditional savings clauses, on the other hand, define the limits of preemption and do not give the states any power over interstate commerce not previously enjoyed. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 48-49 (1980).

Tested against the previous holdings of this Court, the hydroelectric export clause of Section 201(b) is clearly a savings clause defining the scope of preemption by Part II of the Federal Power Act and does not authorize the PUC to regulate and burden commerce.

The plain language of the clause — which states that Part II shall not "deprive" a state of its "lawful authority now exercised" over hydroelectric energy exports — clearly establishes that it confers no authority but is a traditional grandfather

clause simply saving from preemption by Part II whatever restrictions were lawfully imposed prior to the Act's passage. The legislative history of Section 201(b) confirms that Congress intended to preserve whatever state authority predated Part II, not to create any new state authority. Moreover, the clause should be construed consistently with similarly worded clauses contained in Sections 201(a) and (b), 16 U.S.C. §§ 824(a), 824(b) (1976 & Supp. III 1979), that have been construed as savings provisions rather than affirmative grants of power. *E.g.*, *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964); *United States v. Public Utilities Commission of California*, 345 U.S. 295, 311 (1953). Finally, absent a manifest congressional intent to differentiate among states, a construction of the clause as a grant of power to regulate commerce to only the few states that had export restrictions predating the Act should be avoided. A selective delegation of Congress' authority to regulate interstate commerce would be unique. It would, moreover, involve delicate and sensitive issues of federal-state relationships. Therefore, an intent to create distinctions among states regarding the authority to regulate commerce should not be lightly imputed.

Thus, the language, the legislative history, the context of the provision in the statute, and this Court's prior decisions construing cognate provisions, all compel the conclusion that Section 201(b) cannot save New Hampshire's effort at "simple economic protectionism" from a Commerce Clause attack.

B.

The New Hampshire statute as applied by the PUC is preempted by Part I of the Federal Power Act, 16 U.S.C. §§ 792-823 (1976). Under this Court's preemption decisions, state action must fall under the Supremacy Clause if it "stands

as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting federal legislation. *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).

Part I was enacted to provide for "the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest . . . ." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 98 (1965). The primary purpose of the Act was to develop hydroelectric energy to meet the needs of an expanding national economy. *Id.* at 99. To achieve this purpose, the Act embodies the "full measure of Congress' authority under the Commerce Clause to regulate hydroelectric projects." *Id.* at 107. In administering the licensing provisions of the Act, FERC must consider the impact of a proposed project on the "full spectrum of commerce interests." *Id.* at 101.

In enacting Part I, Congress recognized state authority in limited areas. Congress envisioned regulatory regimes that complemented one another, however, and did not contemplate "a divided authority over any one subject." *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 174 (1946). Since a core concern of Congress was the development of hydroelectric power to benefit interstate commerce, any state regulation inconsistent with that objective must fall under the Supremacy Clause.

NEP's Connecticut River hydroelectric projects are all licensed by FERC under Part I on the assumption that the output of the units will benefit interstate commerce. By preventing any sharing of the economic benefits of this hydroelectric generation with non-New Hampshire customers, the PUC's order defeats the purpose of federal licensure, *i.e.*, that the projects serve national, rather than parochial, interests. Moreover, the PUC's order will also discourage NEP from building additional hydroelectric units in New Hampshire or augmenting the capacity of existing units, thereby preventing full develop-

ment of New Hampshire's hydroelectric potential to benefit interstate commerce. The PUC's application of the New Hampshire statute must therefore yield to superior federal authority under Part I.

The hydroelectric export clause in Section 201(b) does not save the New Hampshire statute from Part I preemption since by its terms it applies only to Part II.

C.

The PUC's action is also preempted by Part II of the Federal Power Act. Part II established, in the wake of the *Attleboro* decision, a comprehensive federal regulatory scheme over the transmission and wholesale sale of electric energy in interstate commerce. FERC's jurisdiction under Part II is pervasive, reaching any utility owning facilities used in the transmission of electric energy in interstate commerce. *Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453 (1972). Under the Part II ratemaking provisions (Sections 205 and 206, 16 U.S.C. §§ 824d, 824e (1976 & Supp. III 1979)), all rates for wholesale interstate service must be filed with FERC and are subject to FERC's full investigatory and ratemaking powers. Wholesale rates must be just and reasonable, and must not discriminate unduly among customers or "between localities." Section 205(b), 16 U.S.C. § 824d(b) (1976). FERC also has significant powers to encourage power pooling and to order interconnections and the provision of transmission services between utilities.

NEP is fully subject to Part II. NEP operates an integrated, interstate system; all of its wholesale sales are at rates on file with FERC subject to FERC's plenary rate jurisdiction. The New Hampshire order directly interferes with FERC's juris-

diction. To sell the output of its New Hampshire hydroelectric units within New Hampshire, NEP would have to alter substantially its current wholesale rates and contracts on file with FERC. Any new rates filed by NEP would be subject to attack before FERC under Section 205(b) on the ground that they unduly discriminate between localities. The New Hampshire action attempts to reallocate the costs of generation among wholesale customers. It countermands the specific FERC requirement that utilities average the costs of hydroelectric generation with the costs of all other sources of power and spread the average costs evenly among wholesale customers in all states. New Hampshire's attempt therefore is fatally flawed under basic preemption doctrine. *Maryland v. Louisiana*, 49 U.S.L.W. 4562, 4568-69 (May 26, 1981).

The hydroelectric export clause in Section 201(b) does not save the PUC's action since that clause was never intended to "preserve" state authority over wholesale rates. The clause preserves whatever "lawful authority" certain states exercised over the volume of hydroelectric energy exported in 1935. New Hampshire's attempt to reallocate the economic benefits of hydroelectric energy among NEP's wholesale customers — rather than to regulate the physical transmission of that energy — falls completely outside the scope of Section 201(b).

Finally, since the hydroelectric export clause saves from Part II preemption only those lawful export restrictions actually "exercised" in 1935, it does not save from Part II preemption export restrictions imposed for the first time in 1980.

Argument

I. New Hampshire's Hydroelectric Export Statute Violates the Commerce Clause.

This portion of our argument has two distinct but related parts: First, the New Hampshire statute, viewed independently

of the Federal Power Act, unduly burdens interstate commerce in violation of the Commerce Clause. Second, by providing in Section 201(b) of Part II of the Federal Power Act that nothing in Part II "shall deprive" a state of "lawful authority now exercised," Congress did not affirmatively grant New Hampshire authority over such exports.

This Court made an identical two-part inquiry in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), in striking down Florida statutes under the Commerce Clause. In a passage equally applicable here, the Court framed the dual questions as follows:

> The first is whether the statutes, viewed independently of federal legislation regulating the banking industry, burden interstate commerce in a manner contrary to the Commerce Clause. The second is whether Congress, by its own legislation in this area, has created an area in which the States may regulate free from Commerce Clause restraints. . . .

Id. at 35. The Court resolved both questions against the Florida statutes. The New Hampshire statute as applied is equally invalid.

A. *State Action that Unduly Burdens Interstate Commerce Violates the Commerce Clause.*

The Commerce Clause reflects the fundamental conviction of the Framers that "in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). This Court through the years has been particularly alert to "the evils of 'economic isolation' and protectionism . . . . Thus, where sim-

ple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978). In the absence of congressional consent, the Commerce Clause prevents a state from securing economic advantages for its own citizens by erecting barriers to or placing undue burdens upon interstate commerce. *E.g., Maryland v. Louisiana*, 49 U.S.L.W. 4562 (May 26, 1981); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44; *Pennsylvania v. West Virginia*, 262 U.S. 553, 596-97 (1923). Moreover, a state may not prevent articles of commerce from being sold in interstate commerce simply because "they are required to satisfy local demands or because they are needed by the people of the state." *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928).

The Court has dealt particularly harshly with state attempts to restrict the sharing of their natural resources with other states. In *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911), the Court struck down an Oklahoma statute prohibiting the transportation of natural gas out of the state. Rejecting a state's assertion of a right to reserve "the resources of the State for the use of the inhabitants of the State, present and future," *id.* at 250, the Court declared:

> If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. . . .

Id. at 255.

The Court also overturned a subsequent West Virginia statute strikingly analogous to the New Hampshire statute at issue here. *Pennsylvania v. West Virginia*. The West Virginia statute required natural gas companies producing gas in the state to satisfy the needs of state residents before sending any gas out of state. If allowed to stand, the law would have diverted to local consumers a large amount of gas then flowing

in interstate commerce to other states. The Court held that the statute impermissibly burdened interstate commerce. West Virginia had attempted "to regulate the interstate [gas] business to the advantage of the local consumers. But this she may not do." *Id.* at 597-598. Taken together, the *West* and *Pennsylvania* cases firmly establish that "the location in a given State of a resource bound for interstate commerce is an insufficient basis for preserving the benefits of the resource exclusively or even principally for that State's residents." *Hicklin v. Orbeck*, 437 U.S. 518, 532-33 (1978).

Recent decisions of the Court continue the stern opposition to state attempts to hoard natural resources. In *Philadelphia v. New Jersey*, the Court branded an attempt by New Jersey to prohibit the importation of garbage destined for scarce land fill sites as "parochial legislation" of the kind consistently held to be constitutionally invalid. 437 U.S. at 627. Similarly, in *Hughes v. Oklahoma*, the Court struck down a state law barring the export of minnows caught within the state.

Electricity transmitted in interstate commerce is fully subject to the protections of the Commerce Clause. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 86 (1927). The Court ruled in *Attleboro* that state regulation of the interstate sale of electricity at wholesale unduly burdens interstate commerce. Because the interstate wholesale power business is "essentially national in character," the wholesale transaction in question was "not subject to regulation by either of the two States. . . ." *Id.* at 90.

B. *New Hampshire's Hydroelectric Export Statute Violates the Commerce Clause.*

Application of the above fundamental Commerce Clause principles to this case is straightforward. The importance of the free flow of energy supplies to the vitality of the national

economy, and to the New England economy in particular, is beyond question. A key form of energy — electricity — is produced and transmitted throughout the New England region without regard to state boundaries to meet the region's needs as economically as possible. As the record shows (see pp. 5-6, *supra*) and as the court below readily acknowledged (J.S. App. 11a), power from NEP's Connecticut River hydroelectric plants "is presently mixed in the grid" and flows freely throughout the six-state region. Under *Attleboro*, the transmission and sale at wholesale of that power is in interstate commerce and beyond the power of New Hampshire or any other state to regulate.

The New Hampshire statute as applied by the PUC flatly prohibits the sharing of the significant hydroelectric energy resources between consumers of electricity in New Hampshire and consumers in its neighboring states. In fact, the express purpose of the PUC order (J.S. App. 35a), specifically affirmed by the court below (J.S. App. 14a), is to secure the economic benefits of cheap hydroelectric power exclusively for New Hampshire citizens at the expense of their neighbors. That the PUC order does not purport physically to alter the dispatch of NEP's plant or the actual flow of power in the regional grid is immaterial. The order directly burdens interstate commerce by attempting to control the economic disposition of that power through its command that NEP sell the power only within New Hampshire (J.S. App. 40a).

New Hampshire's action runs directly counter to this Court's holdings in *West, Pennsylvania v. West Virginia* and *Philadelphia v. New Jersey*. It is a stark example of "simple economic protectionism" subject to the Court's virtual "per se rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. at 624.[3]

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[3] New Hampshire's action contrasts sharply with Montana's coal severance tax, recently upheld in *Commonwealth Edison Co. v. Montana*, 49 U.S.L.W. 4957 (July 2, 1981); in that case the Court was not confronted — as it is here — with discrimination by a state against interstate commerce. *Id.* at 4959.

In striking down New Jersey's ban on the importation of garbage, the Court aptly noted:

> The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

Id. at 629.

In response to an energy crisis facing the Nation, New Hampshire has tried to secure a temporary advantage through economic isolation. "But this she may not do." *Pennsylvania v. West Virginia*, 262 U.S. at 598.

C. *In Enacting the Hydroelectric Export Clause of Section 201(b) of the Federal Power Act, Congress Did Not Affirmatively Authorize New Hampshire To Capture the Economic Benefits of NEP's Hydroelectric Generation.*

The court below conceded that the export statute, standing alone, might violate the Commerce Clause (J.S. App. 10a). The court, however, read the hydroelectric export clause in Section 201(b)[4] of Part II of the Federal Power Act as an affirmative grant of power by Congress to New Hampshire and several other states to regulate the exportation of hydroelectric energy (J.S. App. 7a-8a, 10a-11a). Contrary to this ruling, the clause does not affirmatively grant any authority over interstate commerce. It is a traditional savings clause that preserves certain state restrictions from Part II preemption. Section 201(b), therefore, cannot cure the Commerce Clause infirmities of the New Hampshire statute.

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[4] Section 201(b) provides in pertinent part:

> The provisions of [Part II] . . . shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. . . .

1. An Affirmative Grant of Authority Is Required To Authorize State Action Otherwise Prohibited by the Commerce Clause.

As this Court has noted, Congress may exercise its power over commerce indirectly by affirmatively "conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44. See also *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). Where Congress refers in federal legislation to state authority, the courts must determine whether Congress intended affirmatively to extend new authority to the states not previously enjoyed or whether Congress was simply defining the extent of federal preemption. *BT Investment*, 447 U.S. at 48-49. The delegation of affirmative authority to the states must be explicit, however, since transfers or surrenders of sovereign authority will not be presumed. See *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 547 (1837) (surrender of sovereign power not presumed where "'deliberate purpose of the State to abandon it does not appear'").

The *BT Investment* case closely resembles the instant dispute. At issue there was a state statute prohibiting out-of-state bank holding companies from owning a business within the state that sells investment advisory services. This Court first determined that, unless authorized by federal legislation, the state statute directly and unduly burdened interstate commerce in violation of the Commerce Clause. 447 U.S. at 37-44. The Court then turned to the question whether Congress in Section 7 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1846 (1976), had conferred additional authority on the states. In language similar to Section 201(b) of the Federal Power Act, Section 7 provides:

> The enactment by the Congress of [the Bank Holding Company Act of 1956] shall not be construed as prevent-

> ing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

This Court found nothing in this clause or its legislative history indicating a congressional intent to give the states new power to regulate bank holding companies not already possessed. Instead, it found that "Congress' concern was to define the extent of the federal legislation's pre-emptive effect on state law." 447 U.S. at 49.

Congress has commonly included savings clauses in complex federal regulatory legislation when it wishes federal regulation to complement and not completely displace existing state regulation. See, *e.g.*, Section 27 of Part I of the Federal Power Act, 16 U.S.C. § 821 (1976) construed narrowly in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 175-76 (1946). Savings clauses do no more than define the boundary between state and federal authority and do not diminish Congress' exclusive authority to regulate interstate commerce.

This Court has clearly distinguished between such clauses and affirmative grants. It has found an affirmative grant only when a statutory provision contains affirmative, prospective and specific language, particularly when the legislative history of the provision indicates that Congress was aware of the significance of conferring authority upon the states and fully intended to do so. See, *e.g.*, *In re Rahrer*, 140 U.S. 545 (1891) (interpreting the Wilson Act, 27 U.S.C. § 121 (1976)); *James Clark Distilling Co. v. Western Maryland Railway*, 242 U.S. 311 (1917) (interpreting the Webb-Kenyon Act, 27 U.S.C. § 122 (1976)); *Whitfield v. Ohio*, 297 U.S. 431 (1936) (interpreting the Hawes-Cooper Act, 49 U.S.C. § 60 (1976)); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946) (interpreting the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976)). The traditional savings clauses at issue in *BT Investment* and in this case bear no resemblance to

the specific, prospective and affirmative congressional authorizations in those statutes.

2. The Language, Legislative History and Context of the Section 201(b) Hydroelectric Export Clause Establish that the Clause Does Not Affirmatively Grant New Hampshire any Authority to Regulate Interstate Commerce.

The determination whether the Section 201(b) hydroelectric export clause of the Federal Power Act is an affirmative grant of authority to the states or a traditional savings clause defining the scope of preemption is not difficult. The statutory language, legislative history and context firmly establish that it is a savings clause.

On its face, the language of the statute contemplates no authority not previously enjoyed; it is therefore inconsistent with a grant of power to interfere with or burden interstate commerce. Section 201(b) provides in relevant part:

> The provisions of [Part II] . . . shall not . . . deprive a State or State commission of its *lawful authority now exercised* over the exportation of hydroelectric energy which is transmitted across a State line. . . .

(Emphasis added.) Clearly, this language contemplates no authority other than (1) that now exercised and (2) that which is lawful. This language is flatly inconsistent with a grant of authority to regulate commerce because the very purpose of such a grant would be to confer authority (1) which could not then be exercised and (2) which was not then lawful. Thus, the language will not support the meaning that the lower court placed upon it.

The legislative history of the hydroelectric export clause confirms the meaning of its plain language. The original Sen-

ate version of what became Section 201(b) made no reference to state authority over hydroelectric exports. The savings clause was added by the House Commerce Committee. H.R. Rep. No. 1318, 74th Cong. 1st Sess. 18, 27 (1935). Congressman Rogers of New Hampshire explained during the House debates that the savings clause had been added to insulate existing regulation by several states from preemption by Part II. 79 Cong. Rec. 10527 (1935). Congressman Rogers stated:

> [T]he Senate bill as originally drawn would deprive certain states, I think five in all, of certain rights *which they have* over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House Committee, and I hope when you come to it, section 201 of part II, that you will grant us the privilege *to continue, as we have been for 22 years, to exercise our state right* over the exportation of hydroelectric energy transmitted across State lines but produced up there in the granite hills of old New Hampshire.

Id. (Emphasis added.) Congressman Rogers' fears that the Senate bill would "deprive" the states of *existing rights* over exportation of hydroelectric energy and his plea that New Hampshire be allowed "to continue . . . to exercise" its rights confirm that the House addition was a "savings clause," and not an independent, affirmative grant of power. While the Congressman used the word "grant," he was plainly asking Congress to "grant [to the states] the privilege to continue" to exercise existing, lawful authority, and not to permit the states to exercise *new* authority, not otherwise lawful.

Finally, the statutory context of the hydroelectric export clause confirms that it was intended simply to state the extent of preemption under Part II. Part II was enacted in reaction

to this Court's decision in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), holding that state regulation of interstate wholesale sales of power impermissibly burdens interstate commerce. Congress could have filled the gap in regulation arising from *Attleboro* by delegating to the states its authority to regulate such sales. Instead, it filled the gap by vesting in FERC comprehensive and exclusive authority to regulate sales for resale. *United States v. Public Utilities Commission*, 345 U.S. 295, 311 (1953) ("*California*"); *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964) ("*City of Colton*"). At the same time, it drew in Section 201, 16 U.S.C. § 824 (1976 & Supp. III 1979), a bright line between federal and state regulatory authority, which in essence followed that established by *Attleboro*: sales for resale would be regulated by FERC, and sales at retail could continue to be regulated by the states. *City of Colton*, 376 U.S. at 214-216.

While Section 201 sets forth Congress' grant of plenary jurisdiction to FERC, Section 201 contains several other clauses stating exceptions to this grant of federal authority, in addition to the hydroelectric export clause in Section 201(b). The Court has held that "'[e]xceptions to the primary grant of jurisdiction in [Section 201] are to be strictly construed.'" *California*, 345 U.S. at 310, quoting *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 690-91 (1947). Two of those exception clauses have been construed, and in both cases the exception has been read narrowly to permit only those exercises of state power permissible under the *Attleboro* line.[5]

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[5] See *California*, 345 U.S. at 311, refusing to construe the Section 201(a), 16 U.S.C. § 824(a) (1976), exception clause extending federal authority "only to those matters which are not subject to regulation by the States" as an affirmative grant of power: "To conceive of [the section] now as . . . an affirmation of state authority over any interstate sales for resale, would be to speculate about a congressional purpose for which there is no support." *Accord, City of Colton*; *Hartford Electric Light Co. v. Federal Power Commis-*

In drawing the *Attleboro* line, Congress intended to subject to uniform federal regulation those aspects of electric transmission and sale held by *Attleboro* to be national in character and as to which disruption by nonuniform state regulation would be harmful. Thus, in *California* the Court held that Section 20 of Part I of the Act, 16 U.S.C. § 813 (1976), did not affirmatively grant authority to the states to regulate the sale for resale of hydroelectric power. Section 20 allowed FERC to regulate such sales only where state regulation was absent or in conflict.[8] The Court rejected the argument that Section 20 affirmatively authorized state regulation when the two specified conditions triggering FERC jurisdiction were not present. Nor did the Court find merit in the contention that unless Section 20 were construed as an affirmative grant, that section would become meaningless due to *Attleboro's* holding that state regulation of sales for resale directly burden commerce. In the Court's view, Congress simply assumed a breadth of state power that *Attleboro* proved wrong. The Court found no evidence that the limitation of FERC jurisdiction under Section 20 was "done with any firm intent to settle with the states a power essentially national." 345 U.S. at 303. Noting that "an

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sion, 131 F.2d 953, 996 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943), narrowly construing the Section 201(b) exception clause following the hydroelectric export clause (FERC shall not have jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter," 16 U.S.C. § 824(b) (Supp. III 1979)).

[8] Section 20, 16 U.S.C. § 813 (1976), provides in relevant part that

> whenever any of the States directly concerned . . . are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor . . ., jurisdiction is conferred upon the commission, upon complaint of any person, aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce . . ..

exception to federal commission authority for power generated at licensed hydroelectric projects" would apply to only 7.8 percent of total national capacity, the Court stated: "It would have been curious for Congress to have approved a very special type of regulatory scheme for such a minimal fraction of the country's total power." *Id.* at 310 n.18.

Thus, to construe the export clause as an affirmative grant would fly in the face of the conclusion in *California* that Congress intended federal authority to be comprehensive with respect to the aspects of transmission and sale of power that are national in character.[7] Such a construction would, moreover, make that clause unique among the limiting clauses in Sections 201(a) and (b), which have been construed as traditional savings clauses rather than as affirmative grants of power. See n.5, *supra*.

A congressional purpose to grant to the states regulatory power over hydroelectric exports would be curious not only because it would breathe life into the very evils put to rest in *Attleboro*, but because the grant would apply only to particular states. The hydroelectric export clause preserves from preemption only lawful authority "*now* exercised" (emphasis added). Since, as Congressman Rogers noted in explaining the purpose of the amendment, only a few states had provisions regulating exports,[8] only those states would be authorized to

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[7] *Accord, City of Colton*, 376 U.S. at 216-220 (holding that "a proper concern for the objective" of maintaining comprehensive federal regulation required that the jurisdictional grant to the FERC in Section 201(b) be read as superceding and repealing by implication a provision parallel to Section 20, Section 6 of the Boulder Canyon Project Act, 43 U.S.C. § 617e (1976)).

[8] Prior to Part II's enactment in 1935, three states in addition to New Hampshire had statutes either regulating or authorizing regulation of the export of hydroelectric energy: Me. Rev. Stat. Ann. tit. 60, § 1 (1916); Me. Rev. Stat. Ann. tit. 68, § 1 (1930); Wis. Stat. § 31.27 (1931); 1929 W. Va. Acts, ch. 58. Maine has since repealed its law. 1955 Me. Acts, ch. 402 at 400. West Virginia's export statute was held unconstitutional on other grounds in 1931. *Hodges v. Public Service Commission*, 110 W. Va. 649, 159 S.E. 834 (1931). The Wisconsin statute is currently codified at Wis. Stat. § 196.375 (1977).

regulate interstate commerce if the hydroelectric export clause were construed as an affirmative grant. Such a construction, however, would make that part of Section 201(b) unique not only among the exceptions clauses in Part II, but in all of the legislation regulating commerce.

When Congress has delegated to the states its power to regulate commerce, it has done so uniformly.[9] See cases cited p. 21, *supra*. Whether or not it raises constitutional questions, the exercise of legislative power to differentiate among states obviously involves delicate and sensitive questions of federal-state relationships. Therefore a purpose to differentiate should not be lightly imputed to Congress. When, as here, the legislative history neither shows that Congress intended to differentiate among the states by conferring new powers on a limited few, nor reveals the reasons that might have prompted Congress to do so, a construction of the statute that would impute such a purpose must be rejected.

Finally, the fact that there is little, if any, state activity restricting exports that is valid under the Commerce Clause does not change what is clearly a savings clause into an affirmative grant of power.[10] There is no evidence that Congress

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[9] Congress itself has exercised federal power in a manner that differentiated among states. See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604 (1950); see also Section 209 of the Air Quality Act of 1967, 42 U.S.C. § 7543 (Supp. I 1977), discussed in H.R. Rep. No. 728, 90th Cong., 1st Sess. 21-23. In such cases, however, Congress adopted remedial legislation implementing national policy that could not be achieved without considering regional differences in the basic conditions Congress sought to ameliorate. See, *e.g.*, *Hodel v. Indiana*, 49 U.S.L.W. 4667, 4671 (June 15, 1981). Congress explicitly considered those various conditions and clearly intended to differentiate among the states. In contrast, the hydroelectric export clause of Section 201(b) was neither remedial nor designed to implement the national policy enshrined in Part II; its legislative history indicates no congressional awareness of the different state hydroelectric export laws then in effect, and no congressional intent to differentiate among the states.

[10] We do not contend that all restrictions on hydroelectric *generation* would run afoul of the Commerce Clause. It is well settled that a state may

affirmatively wished to permit states to restrict exports. Congress merely reserved to those states with export restrictions whatever power they had *lawfully exercised*. Congress did not examine what export restrictions, if any, were lawful or sanction any particular restrictions — it simply finessed the issue by preserving "lawful authority," whatever it might be.[11]

As this Court has recognized, Congress frequently leaves to the courts the task of determining which restrictions burden interstate commerce.[12] Congressional adoption of such a

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regulate matters of local concern — *e.g.*, protection of the health and safety of its citizens — even though the regulation may have some impact on interstate commerce. *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 186 (1950). When such regulation affects interstate commerce, the Court must balance the competing state and federal claims. *Minnesota v. Clover Leaf Creamery Co.*, 49 U.S.L.W. 4111, 4115-16 (Jan. 21, 1981); *A&P Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976). The Court need not consider whether carefully tailored state regulation of the generation and transmission of hydroelectric energy to conserve scarce water resources or to protect health threatened by the unavailability of electricity would pass the balancing test despite an incidental effect on interstate commerce. In this case the New Hampshire legislation is designed solely to gain an economic advantage for its citizens by discriminating against interstate commerce.

[11] See *Milwaukee v. Illinois*, 49 U.S.L.W. 4445 (April 28, 1981), holding that Subsection 505(e) of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1365(e) (1976), which preserves existing statutory or common law remedies from preemption by Section 505 of the FWPCA, does not signify a congressional determination that such common law remedies existed: "There is nothing unusual about Congress enacting a particular provision, and taking care that this enactment by itself [does] not disturb other remedies, without considering whether the rest of the Act does so or what other remedies may be available." *Id.* at 4452 n.22. (Emphasis added.) Section 505(e) provides in relevant part:

> Nothing *in this section* shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . .

(Emphasis added.)

[12] But in general Congress has left it to the courts to formulate the rules . . . interpreting the commerce clause in its application, doubtless because [Congress] has appreciated the destructive consequences to the commerce of the nation if [the courts'] protection were

practice here, with respect to a matter peripheral to the central purpose of Part II of the Federal Power Act, is not at all strange. Thus, there is no reason to presume that Congress intended to delegate to selected states a power to burden interstate commerce. To the contrary, absent a clear and express manifestation of congressional intent to delegate to the states its power under the Commerce Clause, the established principle of construction is that no such affirmative grant was intended. See, *e.g.*, *City of Colton*, 376 U.S. at 215; *California*, 345 U.S. at 304, 311. *See also Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) at 547.

In short, Section 201(b) does not validate the PUC's action under the New Hampshire statute seeking to capture the economic benefits of NEP's New Hampshire hydroelectric plants for the exclusive enjoyment of New Hampshire citizens. New Hampshire's attempt remains "simple economic protectionism" constituting a *per se* violation of the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. at 624.

II. The New Hampshire Statute is Preempted by Part I of the Federal Power Act.

In 1920, Congress enacted Part I of the Federal Power Act to provide for the comprehensive control of the Nation's water resources. A key purpose of the legislation was to assure that the Nation's hydroelectric energy potential was developed for the benefit of interstate commerce. By prohibiting the energy transmitted from NEP's hydroelectric units from benefiting interstate commerce as envisioned by Congress, the New Hampshire statute conflicts with and is preempted by Part I.

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withdrawn . . . and has been aware that in their application state laws will not be invalidated without the support of relevant factual material which will "afford a sure basis" for an informed judgment.

Southern Pacific Co. v. Arizona, 325 U.S. 761, 770 (1945) (citations omitted).

A. *A State Statute is Void under the Supremacy Clause to the Extent It Frustrates the Basic Objectives of a Federal Regulatory Scheme.*

Under the Supremacy Clause, a state statute is void to the extent it conflicts with a federal law. The conflict may be obvious where, for example, "compliance with both federal and state regulations is a physical impossibility . . . ." *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963). Or the conflict may flow from an evident purpose of Congress to displace state law. As this Court noted in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), a preemptive purpose may be found in several ways:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52 [1941]. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute. . . .

See also Maryland v. Louisiana, 49 U.S.L.W. at 4568; *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973).

In determining whether Congress intended to preempt state regulation, the nature of the state's interest must be examined. Where Congress has acted in an area traditionally occupied by the states, no preemption will be found in the absence of a "clear and manifest purpose of Congress" to displace state law.

Rice, 331 U.S. at 230. On the other hand, where Congress acts in an area in which the federal interest is dominant, a preemptive purpose is much more easily found. *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).

In short, a state law need not directly conflict with a federal law to be void under the Supremacy Clause. The state law must also fall if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67; *Maryland v. Louisiana*, 49 U.S.L.W. at 4568.

B. *The Central Purpose of Part I Is To Benefit Interstate Commerce to the Fullest Extent Possible through the Development and Use of Hydroelectric Power.*

Part I of the Federal Power Act was enacted in 1920 to provide for "the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest . . . ." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 98 (1965). "The principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy." *Id.* at 99.

The drafters of Part I intended that such development would promote to the fullest possible extent the generation, sale and transmission of electricity in interstate commerce without regard to state boundaries. In recommending passage of the legislation, the House Committee on Water Power quoted with approval from a report of the Secretary of Agriculture pointing out that "[t]he power requirements of this country will not be met until we develop our water powers, tie them in with steam plants located at the [coal] mine itself and operate all in great interstate systems." H.R. Rep. No. 61, 66th Cong., 1st Sess. 4-5 (1920). Consequently, "[t]he role of . . . [FERC under Part I] in the control and preservation of our national water resources, when their use is

proposed for power purposes, is to ensure the most comprehensive and best use of those resources for the benefit of all of the people of the nation." *Union Electric Co.*, 27 F.P.C. 801, 809 (1962), *rev'd*, 326 F.2d 535 (8th Cir. 1964), *aff'd*, 381 U.S. 90 (1965).

To this end, Congress established in Part I a comprehensive regulatory scheme which conditions the construction and operation of hydroelectric projects on navigable waters upon the issuance of licenses by FERC. Section 4(e), 16 U.S.C. § 797(e) (1976), establishes federal licensing jurisdiction over any person desiring to construct or operate a facility for the development, transmission and utilization of water power on navigable waters. Such licenses are issued on the condition, among others, that the project "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce . . . ." Section 10(a), 16 U.S.C. § 803(a) (1976). To determine whether a proposed project constitutes the best comprehensive plan for "interstate commerce" within the meaning of Section 10(a), FERC must consider, as a central part of its analysis, the extent to which the project's hydroelectric generation will "meet the needs of an expanding economy." *Union*, 381 U.S. at 99.

In *Union*, this Court held squarely that the Act "reached beyond the control of navigation," 381 U.S. at 106, and "embodied the full measure of Congress' authority under the Commerce Clause to regulate hydroelectric projects." *Id.* at 107.[13] The Court noted that "the comprehensive development of water power, 'in so far as it was within the reach of the federal

[13] The Court in *Union* upheld the requirement of a license under Section 23(b) of the Act, 16 U.S.C. § 817 (1976), for a hydroelectric project on a non-navigable stream despite the fact that the project had no significant effect on commerce on downstream navigable waters. Section 23(b) requires hydroelectric projects on non-navigable streams to be licensed if their construction or operation will affect interstate commerce.

power to do so,' [*First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 180 (1946)], was the central thrust" of Part I. 381 U.S. at 101. In administering the Act, FERC must consider the impact of proposed hydroelectric projects on "the full spectrum of commerce interests." *Id.*

Part I therefore establishes exclusive and final federal authority for the development of hydroelectric power on waters subject to the Act. State laws which interfere with the development of these projects for the benefit of interstate commerce must fall under the Supremacy Clause. To hold otherwise would grant the states a "veto power [which] easily could destroy the effectiveness of the federal act. . . . [and] would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission . . . ." *First Iowa*, 328 U.S. at 164.

In enacting Part I, Congress did not completely displace state authority, but instead preserved the interests of the states in certain areas "without setting up a divided authority over any one subject." *Id.* at 174. The limited authority left to the states, however, does not encompass the right to restrict the export of hydroelectric benefits.[14] The federal government

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[14] Part I did recognize some state authority over hydroelectric rates. Section 19, 16 U.S.C. § 812 (1976), permits state regulation of hydroelectric rates and services which are wholly *intra*state. Such rates and services are not involved in this case. Section 20, 16 U.S.C. § 813 (1976), arguably appears to permit state regulation of interstate rates and services in those instances in which all states directly concerned regulate such sales and are able to agree, but as discussed above, this Court has held that Section 20, enacted in 1920, was nullified by the *Attleboro* decision seven years later. This limitation on state power was statutorily confirmed by the subsequent enactment in 1935 of Part II of the Federal Power Act. *California*, 345 U.S. at 302-310. Thus, Section 20 may be constitutionally construed only to permit state regulation of rates and services which are intrastate or retail. See *supra*, pp. 25-26.

Two other provisions of Part I refer explicitly to state authority. Section 9(b), 16 U.S.C. § 802(b) (1976), requires that each applicant for a license

has, since its inception, had a dominant interest in the Nation's waterways and the promotion of interstate commerce. In view of this dominant federal interest in the subject matter covered by Part I, state statutes restricting the free flow of hydroelectric energy benefits or impeding the maximum development of hydroelectric energy cannot stand. See *Hines v. Davidowitz*, 312 U.S. at 67-68.

C. *The New Hampshire Statute Frustrates the Central Purpose of Part I.*

NEP's hydroelectric projects are licensed by FERC under Part I on the assumption that their electric generation will benefit interstate commerce, to the "full measure of Congress' authority under the Commerce Clause . . . ." *Union*, 381 U.S. at 107. FERC secured jurisdiction over the Connecticut River in 1941, after finding that it was navigable and that hydroelectric power generated therefrom would "[affect] interstate commerce through the transmission of electric energy." *Bellows Falls Hydro-Electric Corp.*, 2 F.P.C. 380,

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submit evidence of compliance with "the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license." This provision is designed to provide FERC with adequate information as to pending applications for licenses. "Its reference to state laws is by way of suggestion to the [FERC] of subjects as to which the Commission may wish some proof submitted to it of the applicant's progress." *First Iowa*, 328 U.S. at 177-178. Section 9(b) does not require compliance with any state laws. *Id.* at 177.

Finally, Section 27, 16 U.S.C. § 821 (1976), expressly saves from federal preemption certain state laws relating to property rights, but it is narrowly limited to property rights for the control, appropriation, use or distribution of water for irrigation or for municipal or other uses of the same nature. *First Iowa*, 328 U.S. at 175-176. Section 27 does not save state laws which purport to regulate the exportation of energy produced at licensed hydroelectric projects.

384 (1941). Since then, each of the hydroelectric stations involved in this case has been and is now licensed under Part I of the Federal Power Act.

The New Hampshire statute as applied by the PUC prohibits NEP from selling the output of its licensed hydroelectric units in New Hampshire to customers outside of the state. The consequence of the PUC decision is to force NEP to assign the economic benefits of the hydroelectric power to other utilities in New Hampshire. To replace these benefits, NEP will be forced to assign the economic costs of more expensive generation to its customers in Rhode Island and Massachusetts.

The PUC's order conflicts with licensure under Part I since it prevents NEP's New Hampshire hydroelectric generation from continuing to benefit interstate commerce to the fullest extent. The necessity for the free flow of such benefits among customers in the three states, without regard to state boundaries, arises from Congress' desire in Part I to make use of the Nation's water power potential to benefit interstate commerce. Thus, the PUC's order defeats the basic premise of the licenses under which NEP's hydroelectric units operate.

The PUC's order also obstructs full attainment of the ends of Part I since it inhibits future development of New Hampshire's hydroelectric potential to further benefit interstate commerce. Neither NEP nor any other company will have any incentive to build new hydroelectric projects in New Hampshire or (in NEP's case) to augment existing projects in order to benefit customers outside New Hampshire. In many cases, such new projects might be built, or existing ones augmented, when the cost of alternative sources of generation rises to a level that makes such additions to capacity feasible. Given the PUC's order, however, few utilities serving customers outside New Hampshire would be able to invest in new hydroelectric capacity in New Hampshire.

The disincentive to the construction of new hydroelectric stations and to the expansion of existing hydroelectric stations

arising from the PUC's action could therefore limit the amount of hydroelectric power produced and inhibit attainment of Part I's goal of encouraging the maximum development of hydroelectric power.

The statute as applied therefore frustrates the central purpose of Part I that hydroelectric power on the Nation's waterways shall be developed for national, rather than local or parochial advantage, and shall be developed to the fullest possible extent to benefit interstate commerce so as to meet the needs of an expanding economy. Since the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. at 67, it is void as applied under the Supremacy Clause.

D. *The Hydroelectric Export Clause of Section 201(b) of Part II Does Not Save the New Hampshire Statute from Part I Preemption.*

The Section 201(b) hydroelectric export clause on its face applies only to Part II of the Federal Power Act. It does not mention Part I and therefore cannot insulate the New Hampshire statute from Part I preemption.

The question arises, however: If Part I, enacted in 1920, preempts operation of the New Hampshire and similar hydroelectric export statutes, what state authority, if any, did Congress save when it enacted Section 201(b) in 1935? The answer lies in a review of the scope of Part I, at least as Congress would have viewed it in 1935, since Part I only preempts application of hydroelectric export statutes to projects licensed under that part of the Federal Power Act.

As originally enacted in 1920, Part I left unregulated the construction and operation of hydroelectric projects on nonnavigable waters. Even if such a project affected interstate commerce within the meaning of Section 23(b) of Part I, prior to 1935 a company could construct or operate it without ever being required to secure a federal license, as long as the river

did not turn out to be navigable. *Union*, 381 U.S. at 109; *Farmington River Power Co. v. Federal Power Commission*, 455 F.2d 86, 89 (2d Cir. 1972); *Puget Sound Power & Light Co. v. Federal Power Commission*, 557 F.2d 1311, 1313-14 (9th Cir. 1977). This limitation on federal jurisdiction was removed by the 1935 amendment to Section 23(b), which made licensure mandatory whenever the proposed project was found to have affected the interests of interstate or foreign commerce. The amendment was not intended to be retroactive, however. *Farmington River Power Co.*, 455 F.2d at 90.

There were many substantial hydroelectric projects in 1935 already constructed on rivers FERC had not determined to be navigable and which remained free of federal licensing requirements. In fact, no determination had been made at that time that the Connecticut River was navigable and none of NEP's projects was then licensed under Part I. And in view of the Court's ruling that navigability be determined on the basis of each river's own unique history and facts, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404 (1941), the issue was far from clear. NEP actively contested that the Connecticut River was navigable and it was not until 1941 that the matter was resolved. *Bellows Falls Hydro-Electric Corp.*, 2 F.P.C., 380, 384.[15]

In short, Congress in 1935 would have seen no Part I barrier to the application of state export statutes to many hydroelectric projects simply because the projects were not subject to Part I at the time. In enacting Section 201(b), Congress could well have assumed that New Hampshire and other states then may have had some "lawful authority" over hydroelectric exports from such projects. Of course, the applicability of such

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[15] NEP's Bellows Falls project is not subject to the New Hampshire statute since it lies on the Vermont side of the Connecticut River (J.A. 9a, 22a).

statutes diminished significantly subsequent to 1935 as more rivers were determined to be navigable.[16]

III. The New Hampshire Statute as Applied by the PUC Is Preempted by Part II of the Federal Power Act.

In addition to being barred by the Commerce Clause and preempted by Part I, the PUC's action under the New Hampshire statute is also preempted by Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k (1976 & Supp. III 1979). The court below recognized that the PUC's order requires NEP to rearrange its existing wholesale rates and contracts on file with FERC (J.S. App. 14a). Yet, Part II of the Federal Power Act grants FERC comprehensive and exclusive jurisdiction over the interstate transmission and sale of electricity at wholesale, *City of Colton*, 376 U.S. at 215, *California*, 345 U.S. at 311, including transmission and sales from hydroelectric projects licensed under Part I. *Pennsylvania Water & Power Co. v. Federal Power Commission*, 343 U.S. 414, 418-19 (1952); *California*, 345 U.S. at 308. While the Section 201(b) hydroelectric export clause saves lawful, preexisting state restrictions on hydroelectric energy exports from Part II preemption, it neither recognizes any state authority over interstate wholesale rates, nor saves any new restrictions on hydroelectric projects imposed after the Act's passage. The PUC's action therefore must give way to superior federal authority under Part II.

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[16] Maine repealed its hydroelectric export statute, known as the Fernald law, Me. Rev. Stat. Ann. tit. 68, § 1 (1930), repealed, 1955 Me. Laws, ch. 402 at 400, when it became apparent that FERC could assert Part I authority over most hydroelectric projects on Maine Rivers. *See* Maine Legislative Record, House, May 17, 1955 at 2302 (statement by Rep. Bernier). For a comprehensive history of the Fernald law, enacted three years prior to, and probably the model for, the New Hampshire statute, see L. Smith, *The Power Policy of Maine*, 80-152 (1951).

A. *In Enacting Part II of the Federal Power Act, Congress Gave FERC Pervasive and Exclusive Regulatory Authority over Interstate Wholesale Sales of Electricity.*

As we discussed earlier, Part II was passed in response to this Court's decision in *Attleboro* that states have no authority to regulate wholesale sales of electricity transmitted in interstate commerce. "Part II is a direct result of *Attleboro*. . . . The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales." *California*, 345 U.S. at 311. Congress gave that authority to FERC in Part II by declaring that federal regulation of such sales is in the public interest, Section 201(a), 16 U.S.C. § 824(a) (1976), and by allowing federal jurisdiction to follow the physical flow of such energy across state lines. Section 201(b), 16 U.S.C. § 824(b) (Supp. III 1979).

The broad reach of FERC's jurisdiction under Part II over interstate wholesale transactions is definitively illustrated by several decisions of this Court. In two early cases, this Court noted Congress' desire to fill the *Attleboro* gap without depriving the states of existing regulatory authority, but pointed out that Congress had defined the Commission's jurisdiction with technical precision. The grant of federal power was

> couched largely in the technical language of the electric art. Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental test.

Connecticut Light & Power Co. v. Federal Power Commission, 324 U.S. 515, 529 (1945). See also *Jersey Central Power & Light Co. v. Federal Power Commission*, 319 U.S. 61, 67-68, 70-71 (1943).

This Court again considered the scope of federal power over wholesale transactions in *City of Colton*. There, FERC had

asserted jurisdiction over the sale of electricity at wholesale by Southern California Edison Company to the City of Colton which in turn distributed the electricity at retail within the city. Although Edison operated solely within California and the City of Colton is located in California, Edison received some energy from Nevada and Arizona, and some of this interstate energy was found by FERC to be included in Edison's sale to the City of Colton. The court of appeals rejected FERC's assertion of jurisdiction, relying on the limitation contained in Section 201(a) of Part II, stating that federal regulation was "to extend only to those matters which are not subject to regulation by the States." This Court reversed the court of appeals' decision and upheld FERC. The Court held that the clear grant of power to the Commission under Section 201(b) of the Act over "interstate sales of [energy] at wholesale" could not be nullified by the very general policy declaration in Section 201(a). 376 U.S. at 215.

A similarly sweeping assertion of FERC jurisdiction was upheld by the Court in *Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453 (1972). In that case, FERC claimed jurisdiction over a utility operating in southern Florida on the basis that some out-of-state energy on occasion reached the utility's facilities. The Court upheld FERC's action, noting that FERC jurisdiction attached no matter how small the quantity of interstate energy reaching the utility. *Id.* at 461 n.10.

The clear consequence of the above holdings is that all wholesale sales of any utility interconnected with an interstate transmission network are subject to FERC regulation under Part II. Of principal concern to this appeal is FERC's exclusive jurisdiction over wholesale rates.

The ratemaking provisions of Part II are contained in Sections 205 and 206, 16 U.S.C. §§ 824d, 824e (1976 & Supp. III 1979). Section 205(a) sets forth the basic standard that all "rates and charges . . . for or in connection with the transmis-

sion or sale of electric energy" are subject to FERC's jurisdiction and "all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable." Any other rate or charge is unlawful.

Section 205(b) is directly pertinent here since it prohibits discrimination among a utility's wholesale customers. No utility may, with respect to a wholesale sale,

> (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either *as between localities* or as between classes of service.

(Emphasis added.) Section 205(c) obligates utilities to file with FERC all rates subject to FERC's jurisdiction, including all contracts which affect such rates. Under Section 205(d), no rate can be changed except upon 60 days' notice. 16 U.S.C. § 824d(d) (Supp. III 1979). Section 205(e) authorizes FERC to investigate new rate filings. FERC may suspend new rates for up to five months, at which point the rates take effect subject to refund upon completion of FERC's investigation. Section 206(a) of the Act gives FERC broad investigatory powers over existing rates; in the event FERC finds a rate to be unlawful, it can determine the appropriate rate to be charged thereafter.

FERC's jurisdiction over wholesale rates under Sections 205 and 206 is plainly comprehensive. And fundamental to the statutory scheme is the principle that no wholesale rate, other than the rate on file with FERC and in effect, may be charged by an electric utility. Neither a court nor a state regulatory commission has authority to establish a different rate. *Arkansas Louisiana Gas Co. v. Hall*, 49 U.S.L.W. 4947 (July 2, 1981); *Montana-Dakota Utilities Co. v. Northwestern Public Service Commission*, 341 U.S. 246, 251 (1951).

Congress in Part II also directed FERC to encourage power pooling and gave it authority, subject to certain limitations, to order interconnections and exchanges of power between utilities. Section 202, 16 U.S.C. § 824a (1976 & Supp. III 1979). This authority was expanded in 1978 and FERC was also empowered to order one utility to provide transmission services for another. Federal Power Act, Sections 210-212, as amended by Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 824i, 824j, 824k (Supp. III 1979). At the same time Congress authorized FERC to exempt electric utilities from state laws prohibiting or preventing voluntary pooling arrangements. Federal Power Act, as amended by PURPA, 16 U.S.C. § 824a-1 (Supp. III 1979). Only state laws designed to protect the environment, conserve energy or mitigate fuel shortages are exempted. *Id.*

Thus, in addition to its authority over wholesale rates, FERC is directed to encourage power pooling and is authorized under certain conditions to order utilities to sell or exchange electric power at wholesale, notwithstanding state laws to the contrary. These powers confirm that wholesale bulk power supply arrangements in interstate commerce are subject to FERC's exclusive jurisdiction.

B. *The PUC's Order Applying the New Hampshire Statute Invades FERC's Exclusive Domain over Interstate Wholesale Rates.*

Part II applies with full force to NEP's business, which consists almost entirely of the interstate sale of electricity at wholesale. As noted at the outset (pp. 4-6, *supra*), all of NEP's units, including its New Hampshire hydroelectric plants, are connected to the regional, interstate transmission grid and are operated under NEPOOL dispatch. Electric energy produced at NEP's generating units flows freely throughout the regional transmission network. Since this energy is therefore in

interstate commerce within the meaning of Part II's jurisdictional provisions, all of NEP's wholesale sales are subject to FERC's rate jurisdiction. See *Federal Power Commission v. Florida Power & Light Co.*; *City of Colton*.

By directing NEP to sell its hydroelectric energy to New Hampshire customers, the PUC's order directly interferes with FERC's regulation of wholesale rates. The PUC's order will require NEP substantially to alter its current wholesale rates and contracts which are on file with FERC and are subject to the full reach of FERC's ratemaking authority under Sections 205 and 206 of Part II. To comply with the order, NEP must decrease the rates it charges its existing New Hampshire wholesale customers and enter into new wholesale transactions with other New Hampshire utilities. Because the economic benefits of the New Hampshire hydroelectric units would no longer be available to NEP's Massachusetts or Rhode Island customers, NEP's wholesale tariffs for those customers would also have to be changed to reflect an increase in rates.

The new "arrangements," whatever their form, would be contracts or rates for wholesale electric service in interstate commerce. As long as New Hampshire's transmission network remains interconnected with transmission lines in the rest of New England, NEP's wholesale rates to and contracts with New Hampshire utilities are subject to exclusive federal jurisdiction. *Florida Power & Light*; *City of Colton*. Since Section 205(b) of Part II, 16 U.S.C. § 824d(b) (1976), prohibits discrimination in rates "as between localities," it is doubtful that FERC would approve any filing package that secured the economic benefits of hydroelectric power for a class of wholesale customers in one locality (New Hampshire) to the detriment of wholesale customers in other localities (Massachusetts and Rhode Island).[17]

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[17] NEP could not avoid this charge simply by selling New Hampshire utilities the output of the Connecticut River units through "unit" contracts

Established FERC policy prohibits the assignment of particular generating units to particular customers. FERC has consistently required utilities to sell the output from all generating units to all customers on the basis of average cost. See *Nevada Power Company*, 10 FPS 5-211, 5-215 to 16 *rehearing denied*, 10 FPS 5-568 (1976), *aff'd*, 589 F.2d 1002 (9th Cir. 1979), holding that the costs of Hoover Dam hydroelectric power allotted to the State of Nevada must be "rolled-in," that is, averaged, by a Nevada utility with all power costs so as to reduce rates to its California customers. By assigning the lower costs of NEP's hydroelectric generation exclusively to customers in New Hampshire, the PUC's order directly violates this federal policy. Such interference with FERC's authority to determine the allocation of generating costs among wholesale customers is indistinguishable from Louisiana's attempt to allocate the costs of its first use tax between gas producers and gas pipelines, held preempted by FERC's similar authority under the Natural Gas Act[18] in *Maryland v. Louisiana*, 49 U.S.L.W. at 4568-4569.

While the PUC avoided the question of the need for FERC approval of these changes, the court below recognized that "new rates, contract modifications or accounting adjustments . . . may naturally flow from the export termination," and ordered NEP to "make appropriate adjustments and filings with the appropriate federal and State administrative agencies" (J.S. App. 14a). Exactly what will happen if FERC dis-

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(*i.e.*, contracts covering the output of one or more units). Unit contracts are entered into to benefit existing customers generally by allowing other utilities to pay the costs of carrying excess generating capacity. They are not consummated to injure existing customers by depriving them of the benefits of the most economic units available; to the extent that such contracts were entered into, they would be subject to challenge under Section 205(b).

[18] 15 U.S.C. §§ 717-717w (1976), as amended by the Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 and 42 U.S.C. § 7255 (Supp. III 1979).

approves the filings, the court does not say. Conceivably, NEP could be whipsawed by the conflicting demands of different sovereigns, *i.e.*, it could be ordered by FERC not to favor New Hampshire customers and by the PUC to do just that. The possibility of such interjurisdictional squabbling between federal and state agencies, with utilities caught in the middle, is totally at odds with the fundamental purpose of Part II — to give FERC complete and unified jurisdiction over interstate sales of electricity at wholesale. See *supra*, pp.23-26.

C. *The Section 201(b) Hydroelectric Export Clause Does Not Protect the PUC's Application of the New Hampshire Statute from Part II Preemption.*

In the absence of the Section 201(b) declaration that nothing in Part II shall "deprive" a state of its "lawful authority now exercised" over hydroelectric energy exports, there could be little question but that the PUC's application of the New Hampshire statute is preempted by Part II. The remaining question is whether the Section 201(b) hydroelectric export clause was intended to reach the type of regulatory action undertaken by New Hampshire in this case. We submit it was not, for two reasons: (1) the clause does not "save" any state authority to regulate rates in wholesale sales of electricity; and (2) the clause does not save any state export restrictions imposed for the first time after the enactment of Section 201(b) in 1935.

Section 201(b) on its face refers to authority over the "exportation" of hydroelectric energy "transmitted" across state lines. These are physical terms. At most, the hydroelectric export clause preserves lawful state restrictions on the physical exportation of power; no state authority is recognized over the wholesale contracts and tariffs that govern the allocation of the economic benefits of the power.

This Court expressly recognized this distinction in *California*. That case involved an unsuccessful challenge to federal jurisdiction under Part II of the Federal Power Act over hydroelectric projects licensed under Part I. The Court rejected the argument that Section 201(a) of Part II preserved state jurisdiction over wholesale rates under Section 20 of Part I. See *supra*, p. 25. It also viewed the hydroelectric export clause "in apparently similar vein," noting that it

> certainly does not go beyond that of § 201(a) . . . in limiting federal authority. This is true, not only because of the substantial similarity of the language, but also because it *appears not to have been drafted with state rate regulation in mind*. Rather, 79 Cong. Rec. 10527 [Statement of Congressman Rogers] indicates that the provision was intended to preserve the validity of certain state statutes prohibiting or regulating the *volume* of state power exported. Compare S 2796, 74th Cong, 1st Sess, as introduced, § 201 (b), and *idem*. as reported in the House, Union Calendar No. 451, § 201 (b). It has been so construed. *Safe Harbor Water Power Corp.*, 5 F.P.C. 221, 235.

345 U.S. at 300-301 n.4 (emphasis added.)

The PUC did not purport to regulate the "volume" of power generated at NEP's hydroelectric units and transmitted across state lines. In fact, its order does not require any change in the way the units are dispatched or the power is transmitted. As we have noted, the PUC's directive that NEP sell the power within New Hampshire requires a restructuring of NEP's existing wholesale tariffs and contracts based upon a reallocation of the costs of electric generation. The PUC's action thus constitutes "state rate regulation" pure and simple — a matter not covered by Section 201(b).[19]

---

[19] Arguably, even volumetric restrictions on hydroelectric exports would have an impact on a utility's wholesale tariffs in that the restricted

In enacting Section 201(b), Congress preserved whatever "lawful authority" certain states then possessed over hydroelectric energy exports. Congress did not "preserve" for the states what it clearly understood to be unconstitutional under *Attleboro* — state authority over interstate wholesale rates. Section 201(b) therefore does not save the PUC's action from preemption by Part II.

The Section 201(b) hydroelectric export clause cannot save the PUC's action from Part II preemption for an additional and independent reason. The plain language of Section 201(b) limits its savings effect to "lawful authority *now exercised*." (Emphasis added.) This language saves from preemption only those export restrictions imposed prior to the Act's passage. Congress' evident concern was to prevent disruption of economic relationships developed as a result of lawful export restrictions already in effect on hydroelectric stations existing at the time of the Act's passage. Certainly nothing in the language or legislative history suggests an intent to permit the few states that had imposed such restrictions or whose legislatures had authorized their imposition to act *prospectively* to disrupt existing *interstate* economic arrangements. Yet, such disruption could well result if the provision is stretched from a grandfather clause saving only existing export restrictions to one contemplating the prospective imposition of export restrictions.[20] Properly construed, the Section 201(b)

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energy would not be available for transmission in interstate commerce. That kind of impact on rates would be incidental and secondary, however, and therefore would not constitute prohibited wholesale ratemaking. Here the interference with wholesale rates arising from the PUC's order is direct and deliberate.

[20] Even if the hydroelectric export clause were construed to permit a restriction on hydroelectric exports by reallocating the costs of generation among wholesale customers, the effect of any such restriction applied to NEP's New Hampshire hydroelectric stations in 1980 is to upset economic relationships developed over many years. NEP's hydroelectric stations sub-

hydroelectric export clause does not save from Part II preemption the PUC's restrictions imposed in 1980, forty-five years after the Act's passage in 1935.

Conclusion.

The decision below should be reversed.

Respectfully submitted,

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July 24, 1981.

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ject to the PUC order were constructed from 1930 to 1956 (J.A. 20a). Over the years, NEP's customers in Massachusetts, Rhode Island, and New Hampshire have largely paid for the investment in these plants through depreciation charges included in rates. Therefore, in addition to the lower cost of hydroelectric energy, all of NEP's customers now enjoy lower fixed costs arising from such depreciation. Now, after all of NEP's customers have substantially paid for these projects, New Hampshire for the first time has tried to capture their benefits exclusively by expropriating an economic advantage attributable to many years of investment by *all* of NEP's customers.

Appendix.

The pertinent provisions of Part I of the Federal Power Act, 16 U.S.C. §§ 792-823 (1976), are as follows:

SECTION 4, 16 U.S.C. § 797

The Commission is hereby authorized and empowered —

* * *

(e) . . . . To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided* further,

That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided* further, That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

• • •

SECTION 10, 16 U.S.C. § 803

All licenses issued under this [Part I] shall be on the following conditions:

(a) . . . . That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for

other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

• • •

SECTION 20, 16 U.S.C. § 813

• • •

. . . [W]henever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the commission, upon complaint of any person, aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

• • •

SECTION 23(b), 16 U.S.C. § 817

* * *

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works, across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

• • •

The pertinent provisions of Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k (1976 & Supp. III 1979), are as follows:

SECTION 201, 16 U.S.C. § 824

(a) . . . . It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this [Part II and Part III] and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) . . . . (1) The provisions of this [Part II] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this [Part II and Part III], over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

• • •

(c) . . . . For the purpose of this [Part II], electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) . . . . The term "sale of electric energy at wholesale" when used in this [Part II], means a sale of electric energy to any person for resale.

(e) . . . . The term "public utility" when used in this [Part II and Part III] means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of [Sections 210, 211 or 212 of this Act]).

• • •

SECTION 205, 16 U.S.C. § 824d

(a) . . . . All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) . . . . No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) . . . . Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may

designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) . . . . Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) . . . . Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full

hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

* * *

SECTION 206, 16 U.S.C. § 824e

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory

or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * *

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CLERK

Nos. 80-1208, 80-1471 and 80-1610.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

NEW ENGLAND POWER COMPANY,
APPELLANT,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.,
APPELLEES.

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,
v.
NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL,
APPELLEE.

DENNIS J. ROBERTS II, ET AL.,
APPELLANTS,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.,
APPELLEES.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

Brief of Appellants Dennis J. Roberts II, et al.

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Questions Presented.

Invoking for the first time a 1913 state statute, the New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling outside the state any energy generated by NEP's federally licensed hydroelectric projects in New Hampshire. The energy is currently delivered to an interstate transmission network and sold in three New England states including New Hampshire. These appeals are from a judgment of the New Hampshire Supreme Court upholding the state statute as applied by the PUC. The questions presented are:

1. (a) Whether the New Hampshire statute as applied by the PUC to secure the economic benefits of hydroelectric energy generated within the state exclusively for the citizens of that state unduly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution?

(b) Whether Congress, in providing in Section 201(b) of Part II of the Federal Power Act that nothing in Part II "shall deprive" any state of "lawful authority now exercised" over hydroelectric energy exports, affirmatively granted New Hampshire the power to restrict such exports?

2. Whether Part I of the Federal Power Act, vesting comprehensive licensing authority in the Federal Energy Regulatory Commission ("FERC") over NEP's hydroelectric projects, preempts the statute as applied by the PUC?

3. Whether Part II of the Federal Power Act, vesting exclusive jurisdiction in FERC over wholesale sales of electricity in interstate commerce, preempts the state statute as applied by the PUC to require NEP to rearrange its existing wholesale tariffs and contracts to effect a transfer of the economic benefits of the hydroelectric energy to New Hampshire citizens?

4. Whether the New Hampshire statute, as construed and applied by the New Hampshire Supreme Court and the PUC,

violates the privileges and immunities of the citizens of the State of Rhode Island and the Commonwealth of Massachusetts in contravention of article IV, § 2 of the United States Constitution?

5. Whether, assuming that Congress has exempted the New Hampshire statute from the reach of the Commerce Clause, Congress has violated that Clause by favoring one state over another in an area of fundamental economic and social importance, or, alternatively, whether Congress has violated the rights of the State of Rhode Island and its citizens and the Commonwealth of Massachusetts and its citizens, as guaranteed by the Tenth Amendment or the Privileges and Immunities Clause?

Parties to the Proceeding Below.

The following parties appeared before the New Hampshire Supreme Court: New England Power Company, Commonwealth of Massachusetts, Dennis J. Roberts II, Attorney General of Rhode Island, Edward F. Burke, Administrator of the Rhode Island Division of Public Utilities and Carriers, the State of New Hampshire and the New Hampshire Legislative Utility Consumers' Council.

All of the parties appearing before the New Hampshire Supreme Court are listed in the caption.

Appellant Dennis J. Roberts II, Attorney General of the State of Rhode Island, is, pursuant to R.I. Gen. Laws § 42-9-6, the "legal advisor of the individual legislators of the general assembly, of all state boards, divisions, departments, and commissions and the officers thereof. . . ." Under common law, he is the representative of the public, empowered to bring actions to redress grievances suffered by the public as a whole.

Rhode Island Gen. Laws §§ 39-1-1, *et seq.*, vest in Appellant Edward F. Burke, Administrator of the Rhode Island Division of Public Utilities and Carriers:

> the exclusive power and authority to supervise, regulate and make orders governing the conduct of companies offering to the public in intrastate commerce energy . . . for the purpose of increasing and maintaining the efficiency of such companies, according desirable safeguards and convenience to their employees and to the public, and protecting them and the public against improper and unreasonable rates, tolls and charges by providing full, fair and adequate administrative procedures and remedies. . . .

R.I. Gen. Laws § 39-1-1.

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V. If Congress has exempted the New Hampshire statute from the reach of the Commerce Clause, then Congress has violated that clause by favoring one state over another in an area of fundamental economic and social importance, or, alternatively, Congress has violated the rights of the State of Rhode Island and its citizens and the Commonwealth of Massachusetts and its citizens, as guaranteed by the Tenth Amendment or the Privileges and Immunities Clause 20

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16 U.S.C. §§ 824-824k 6, 13, 15, 17, 18 *et seq.*

Opinions Below.

The opinion of the New Hampshire Supreme Court (J.S. App. 1a-14a)[1] is not yet reported. The PUC's Report and Order dated August 27, 1980 (J.S. App. 15a-24a) and its Report and Order dated September 19, 1980 (J.S. App. 25a-40a) are also unreported.

Jurisdiction.

This is an appeal from a final judgment of the New Hampshire Supreme Court upholding a New Hampshire statute as applied by the New Hampshire Public Utilities Commission to ban the export of hydroelectric energy generated within the state. The Court rejected claims that the statute as so applied violates the Constitution and laws of the United States. Judgment was deemed to have been entered on December 23, 1980, when the decision of that Court was docketed by its clerk. Notices of appeal were filed below on January 12, 1980 (J.S. App. 41a; 80-1610 J.S. App. 1a) and January 15, 1980 (80-1471 J.S. App. 3a). The appeals were docketed on January 19, 1981 (No. 80-1208), February 27, 1981 (No. 80-1471) and March 23, 1981 (No. 80-1610). On May 18, 1981, this Court noted probable jurisdiction and consolidated the three cases. The Court has jurisdiction of these appeals under 28 U.S.C. § 1257(2).

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 80-1208.

Constitutional and Statutory Provisions Involved.

This case raises questions concerning the validity of New Hampshire's hydroelectric export statute, NH RSA 374:35, under the Commerce and Supremacy Clauses of the United States Constitution (art. I, § 8, cl. 3 and art. VI, cl. 2) and the Federal Power Act (16 U.S.C. §§ 792-824k).

New Hampshire RSA 374:35 provides:

> Permission Required. No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention to do so with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

Article I, § 8, cl. 3 of the United States Constitution provides:

> The Congress shall have power
>
> . . . . . .
>
> To regulate Commerce with foreign Nations, and among the several States and with Indian Tribes; . . ..

Article VI, cl. 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statement of the Case.

This case involves an attempt by New Hampshire to secure the ultimate economic benefits of one of its natural resources exclusively for the benefit of its own citizens. The resource in question is the energy of that portion of the Connecticut River within New Hampshire. Such energy is converted to electric energy by privately owned plants situated along the river. This electric energy is then delivered to a highly integrated, regional transmission grid serving all of New England. The New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling the energy outside of New Hampshire. The stated goal of the PUC's Order was to reduce electric rates for New Hampshire consumers at the expense of consumers in Rhode Island and Massachusetts.

A. Facts.

NEP is a public utility which generates and transmits electricity at wholesale in interstate commerce (J.A. 11a-12a).[2] In

[2] "J.A." refers to the Joint Appendix.

Rhode Island, NEP sells electricity to the Narragansett Electric Company (J.A. 7a-8a). The Narragansett Electric Company in turn resells this electricity at retail to Rhode Island consumers. In addition to its sales to Narragansett, NEP sells electricity to other retail affiliates (J.A. 7a-8a). These affiliates in turn resell the electricity to customers in Massachusetts and New Hampshire. In addition, NEP also sells power at wholesale to some thirty nonaffiliated utilities (J.A. 8a).

The hydroelectric units over which the Commission asserts jurisdiction provide approximately 420 megawatts of generating capacity for NEP (J.A. 16a). These units are located along the Connecticut River, which divides New Hampshire from Vermont (J.A. 9a-10a). Each of these units is licensed by the Federal Energy Regulatory Commission ("FERC") (J.A. 11a-12a).

NEP is a member of the New England Power Pool ("NEPOOL") (J.A. 12a-13a). That organization provides for the coordinated operation of the bulk power supply systems in New England (J.A. 13a-14a). Its membership includes over 98% of the generation capacity and virtually all of the transmission facilities within the six-state New England region (J.A. 30a). Its functions also include provision for joint efforts and planning on a regional basis to meet the future electric power needs of the New England region (J.A. 13a, 31a). Its goals, which have been successfully met, are to ensure that the electric utilities of New England, and their customers, "obtain an equitable share of the benefits of reliable interconnection, economies of scale, and system back up in emergencies" (J.A. 26a). Given its obvious advantages and success, NEPOOL should serve as a model for the rest of the country.

The economic advantage which New Hampshire seeks to gain arises in the following manner. At present, generating capacity is dispatched by NEPOOL's centrally located computer dispatch system (J.A. 32a). Under the system, the least

expensive combination of generating capacity is placed in service to meet the system's needs. *Id.* Thus, at any given time, the power is generated in the most efficient manner by this central assignment of the most efficient units.

Each generating unit has its own incremental cost of supplying power. Because hydroelectric generating units develop power without the necessity for the consumption of fossil fuels, the necessity for a fuel adjustment charge is avoided (J.A. 14a, 35a). By claiming all of the hydroelectric power, New Hampshire will reduce its dependence on fossil fuel generation and correspondingly increase its neighbors' needs for such generation. Thus New Hampshire will shift its fuel costs to its neighbors.

NEP's operations are comprehensively regulated by FERC under the Federal Power Act. For example, NEP's wholesale rates are subject to approval by the FERC (J.A. 10a-11a). Likewise, NEP's participation in NEPOOL is governed by an agreement investigated and approved by the FERC. *New England Power Pool Agreement*, Opinion 775, 10 FPS 5-594 (1976), *affirmed*, *Municipalities of Groton* v. *Federal Energy Regulatory Commission*, 587 F.2d 1296 (D.C. Cir. 1978). Attorney General Roberts and Administrator Burke ("Rhode Island") have been regular and active participants in such regulatory proceedings before the FERC regarding NEP.

B. Proceedings Before the PUC.

On November 21, 1979, the PUC instituted an investigation to determine whether it should continue to permit NEP to export hydroelectric energy generated at NEP's Connecticut River plants (J.A. 4a-6a). The PUC contended that it had the authority to take such action under NH RSA 374:35 ("the New Hampshire statute"). Since 1913, New Hampshire had asserted

a statutory right to require its approval prior to the export of hydroelectric power from New Hampshire. In each instance, since 1913, this permission had been granted. Now, an abrupt reversal was to take place.

NEP and Rhode Island moved to dismiss the proceedings, asserting that the PUC's proposed course of action was unconstitutional. The parties argued to the Commission that three federal grounds barred its proposed course of action:

(1) It would place an undue burden on interstate commerce;
(2) Such action was preempted by FERC licensing authority over NEP's hydroelectric projects under Part I of the Federal Power Act; and
(3) The statute in question had likewise been preempted by FERC's regulation of NEP's wholesale sales under Part II of the Act.

The PUC initially deferred ruling on the motions to dismiss. In the interim, hearings on the merits were held. On August 27, 1980, the PUC denied the motions to dismiss (J.S. App. 15a-24a).

The PUC issued its ruling on the merits on September 19, 1980 (J.S. App. 25a-40a). Interpreting the Act to permit appropriation of economic benefits without requiring the physical retention of the hydroelectric power, the PUC formally withdrew the existing permission to export this energy. NEP was directed to make arrangements to sell this power "to persons, utilities and municipalities within the state of New Hampshire."

C. The New Hampshire Supreme Court's Decision Below.

Each of the appellants in this consolidated case filed an appeal from the PUC's August 27 and September 19 Orders. The

Court rejected the various federal and state claims of the parties and upheld the New Hampshire statute as applied by the PUC (J.S. App. 1a-14a).

The New Hampshire Supreme Court rejected the parties' arguments that the New Hampshire statute as applied by the PUC violated the Commerce Clause (J.S. App. 6a-8a, 10a-12a). Instead, the Court found that the New Hampshire statute had been from its conception a proper exercise of a state's powers under the Commerce Clause. At the same time, the Court also found that Congress had "recognized as valid and lawful" this exercise of the state's authority by inserting a savings clause in Section 201(b) of Part II of the Federal Power Act (J.S. App. 7a-8a).

The Court likewise rejected the parties' claims that the PUC was preempted from exercising such authority by Parts I and II of the Federal Power Act. In so finding, the Court characterized the Commission's actions as "not a control of rates but rather a control of the assignment of the power" (J.S. App. 12a). At the same time, the Court did acknowledge that "new rates, contract modifications, or accounting adjustments . . . may naturally flow from the export termination" (J.S. App. 14a).

The Court remanded the case to the PUC for further proceedings to implement the Commission's Order. The PUC has not acted on remand pending resolution of these appeals by this Court.

Summary of Argument.

The New Hampshire PUC's Order purports to require NEP to give the economic benefits of electric energy generated from hydropower only to New Hampshire consumers. The Com-

merce Clause prohibits New Hampshire from so securing those economic benefits of its own resources exclusively for New Hampshire consumers. *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911). The interstate transmission and sale of electric energy constitutes interstate commerce. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

New Hampshire's actions and its effects on their neighbors illustrate the fundamental interdependence of the states which underlies the Commerce Clause's prohibition against such attempts. From the wry jests of the founding fathers that they must hang together or they would hang separately to the sophisticated markets of modern commerce, the states have prospered because of the synergistic nature of the Union, not as a result of their own success at retaining their natural assets. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

New Hampshire's reliance on Section 201(b) of Part II of the Federal Power Act is misplaced. On its face, that section says no more than that Part II shall not "deprive" a state of its "lawful authority now exercised" over the export of hydroelectric energy. The natural and obvious meaning of this language is that the states may retain whatever authority they lawfully exercised prior to the passage of Part II. To read it as a Congressional endorsement and ratification of whatever lawful or unlawful practices the states had theretofore engaged in in this regard is to strain the plain meaning of such language beyond its capacity. It is far more logical to assume that Congress, uncertain about the legal validity of what the states had been doing, cautiously decided to leave such questions to the court and to only preserve "lawful" activity.

As to the balance of the issues on appeal, these Appellants rely on and incorporate by reference herein the arguments and authorities of the Appellants in Nos. 80-1208 and 80-1471 in Parts II through V.

Argument.

I. New Hampshire's Hydroelectric Export Statute as Applied by the PUC Violates the Commerce Clause.

This matter requires the Court to make the same two-part analysis that it made in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), in striking down the statutes challenged therein under the Commerce Clause. In that case, the Court described the appropriate inquiries:

> The first is whether the statutes, viewed independently of federal legislation regulating the banking industry, burden interstate commerce in a manner contrary to the Commerce Clause. The second is whether Congress, by its own legislation in this area, has created an area in which the States may regulate free from Commerce Clause restraints.

447 U.S. at 35.

A. *State Action that Unduly Burdens Interstate Commerce Violates the Commerce Clause.*

The Commerce Clause provides that "The Congress shall have power . . . To regulate Commerce . . . among the several States." U.S. Const., art. I, § 8, cl. 3. As this Court has noted, the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

State attempts at economic protectionism have consistently been struck down by this Court, including attempts to restrict the sharing of natural resources with other states. *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911). In that case, the Court noted that:

> If the states have such power, a singular situation may result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals.

221 U.S. at 255. The Court might well have added, "New Hampshire might keep its hydropower."

B. *The New Hampshire Statute as Interpreted and Applied by the PUC and the New Hampshire Supreme Court Violates the Commerce Clause.*

In *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 86 (1927), this Court held that electricity transmitted in interstate commerce is subject to the protections of the Commerce Clause. Recently, relying on *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911), and *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), the Court stated:

> "The location in a given state of a resource bound for interstate commerce is an insufficient basis for preserving the benefits of the resource exclusively or even principally for the state's residents." *Hicklin* v. *Orbeck*, 437 U.S. 518, 532-533 (1978).

In his testimony before the Commission, Administrator Burke discussed the interdependence of the New England

states upon one another for the efficient and reliable distribution of electric power (J.A. 25a-26a). He reviewed the great strides that the states had made, particularly in the area of NEPOOL (J.A. 25a-28a). That system, which serves as a model to the entire country, has, over the years, resulted in great savings to all of its participants, including the people of New Hampshire. Indeed, he testified that today more than ever it seems critical for the New England states to continue to work together to use most efficiently the limited resources which they have and to bring new sources of power into the region (J.A. 27a-28a). Administrator Burke reviewed New Hampshire's past efforts in concert with its neighboring states. He expressed his concern that:

> The withholding of significant amounts of electric power from the NEPOOL system by any member utility or by any state action would, in my opinion, constitute a retreat from the many advances which I have described and would disrupt the workings of this finely tuned and highly efficient system. . . .

(J.A. 27a-28a.)

The PUC, as upheld by the Supreme Court, concluded that New Hampshire's "public good" could be advanced by achieving goals such as providing electric service at the lowest possible cost, and achieving a fair distribution of limited natural resources. Of course, the Commission limited its consideration to what it felt was "good" and "fair" for the people of New Hampshire.[3]

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[3]The Commission made numerous references to what it apparently regarded as unsatisfactory positions taken by NEP and by the Commonwealth of Massachusetts with respect to the problem of the Public Service Company of New Hampshire's Seabrook generating facility (J.S. App. 32a-35a). The precise role of such considerations, if any, in the final decision is unclear. In any case, the PUC did not suggest that Rhode Island had in any way participated in the actions complained of.

It seems obvious that New Hampshire's action is violative of this Court's holdings in cases such as *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911), *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), *Philadelphia* v. *New Jersey*, 437 U.S. 617, 623-624 (1978), and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). Indeed, citing *Philadelphia* v. *New Jersey*, the New Hampshire Supreme Court stated that:

> It might be questionable, in the absence of § 201(b) of the Federal Power Act, that there would be authority for New Hampshire to interdict the flow of electricity that would otherwise continue to benefit two sister states . . . .

(J.S. App. 10a.)

In its desire to serve what it perceives as the best interests of its citizens, New Hampshire has sought to breathe life into a statute which is simply unreflective of the realities of modern life. As Administrator Burke noted in his testimony:

> I wish to point out, however, that RSA 374:35 was enacted by the New Hampshire legislature in a different era. In 1913, the electrical power needs of New Hampshire, Rhode Island and all other states were met principally by small size generating units, which abounded throughout the region. Many of those were hydro-electric facilities. As society grew more complex and as modern technology, industry and domestic consumption required increasingly larger amounts of electricity, more sophisticated methods of generation were developed. There developed not only systems of large scale generating facilities, principally of the fossil-fuel type, but also sophisticated transmission and distribution systems, which led to the development of the present interconnect-

ing network throughout the New England region and other parts of the United States and Canada. . . .

(J.A. 25a.)

In sum, the New Hampshire statute clearly violates the Commerce Clause unless such action has been affirmatively authorized by Congress.

C. *In Enacting Section 201(b) of the Federal Power Act, Congress did Not Affirmatively Authorize New Hampshire to Capture the Economic Benefits of NEP's Hydroelectric Generation.*

Despite its reservations about the constitutionality of the New Hampshire statute under the Commerce Clause, the New Hampshire Supreme Court nonetheless relied upon Section 201(b)[4] of Part II of the Federal Power Act to uphold the PUC's actions. Contrary to the New Hampshire Supreme Court's strained interpretation of Section 201(b), that Section simply does not grant the Commission the authority to enrich its citizens at the expense of its neighbors. At best, Section 201(b) preserves whatever lawful authority the PUC might have exercised, consistent with the Commerce Clause and the Supremacy Clause, prior to the passage of Part II of the Federal Power Act.

In the exercise of its authority under the Commerce Clause, Congress may confer upon the states an ability to restrict the flow of interstate commerce that they would not otherwise

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[4] Section 201(b) provides in pertinent part: "(1) the provisions of [Part II] . . . shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted over a state line."

enjoy. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980); *see H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 542-543 (1949). If Congress so acts to permit the states to regulate some aspect of interstate commerce, then such regulatory action by a state, so long as it is within the scope of the Congressional authorization, is not violative of the Commerce Clause. Moreover, such delegations of authority to the states must be explicit, since such a delegation of federal authority will not be presumed. *See Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420, 547-548 (1837).

Congressional delegation of authority of this type may be expressed in different forms according to the extent of the authority which Congress intends to delegate. In some cases, the states may have previously exercised legitimate authority, and their right to exercise that authority would otherwise be terminated by some Congressional action. If Congress wished to permit the states to continue to exercise those powers which they had previously lawfully exercised, then Congress will customarily express this intent in a savings clause. For example, in the *BT Investment* case, the Court considered the following language:

> The enactment by the Congress of the Bank Holding Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

447 U.S. at 45 n.12. The Court found such language and its accompanying legislative history to indicate an intent to permit the states to continue to exercise powers which they legitimately possessed prior to the enactment of the legislation. In other words, "it appears that Congress' concern was to define

the extent of the federal legislation's preemptive effect on state law." 447 U.S. at 49.

On the other hand, Congress is free to delegate to the states authority which they would not otherwise possess in the absence of such a delegation. When Congress so acts, the states are free to exercise the delegated authority to the extent set forth in such delegation. Typically, such delegations of new or additional authority to these states have been couched in clear and explicit terms.

When one examines Section 201(b) on its face and in the circumstances of its enactment, one is lead inescapably to the conclusion that it is merely a savings clause and not a source of new authority. Section 201(b) provides in relevant part that:

> The provisions of [Part II] . . . shall not . . . *deprive* a State or State commission of its *lawful authority now exercised* over the exportation of hydroelectric energy which is transmitted over a state line. (Emphasis added.)

Webster's Third New International Dictionary, 606-607 (1971), defines the word "deprive" to mean "to take away," "to take something away from," "to take an office, dignity or benefice from," "remove from office" or to "keep from the possession, enjoyment, or use of something." In everyday use, it usually implies "a taking away of what one has, owns, or has a right to." Therefore, Congress plainly intended to preserve *existing* rights, not to grant new ones. Indeed, this becomes increasingly clear as one moves through the text of Section 201(b).

Congress went on to describe what was not to be "deprived" as "lawful authority now exercised." If Congress did not entertain certain reservations about the lawful character of the "authority now exercised," then it would not have been neces-

sary for them to qualify the phrase "authority now exercised" with the word "lawful." Certainly, with the deletion of the word "lawful," a much stronger argument could be made that it was the intent of Congress to preserve and legitimize *all* of the authority previously exercised by the states in that area.

The New Hampshire Supreme Court likewise had difficulty in interpreting Section 201(b). If the Court found that the words of that Section constituted a grant of new authority, then the Court likewise implicitly found that the authority which the state had purported to exercise prior to the passage of Section 201(b) did not in fact exist. On the other hand, if Section 201(b) was interpreted as a savings clause, then the Court had to address the question as to whether or not what was saved was sufficient in scope to justify the actions taken in 1980. The Court resolved this question in the following fashion:

> Thus [201(b)] was specifically intended to preserve the power of a State or its Commission over exportation of electricity under then existing laws similar to the New Hampshire statute, which were recognized as valid and lawful. *See*: *Safe Harbor Water Power Corporation*, 5 F.P.C. 221, 235 (1946); *United States* v. *Public Utilities Commission*, 345 U.S. 295, 300 n.4 (1953).

(J.S. App. 7a-8a.) This reading of the statute strains the plain meaning of the language. Congress had no reason to include, as a matter of draftsmanship, a conclusion that existing state legislation in this regard was lawful. As will be shown hereafter, nothing in the legislative history of this Act suggests that Congressman Rogers sought such an imprimatur from his colleagues. Moreover, neither of the cases upon which the New Hampshire Supreme Court relied were required to address the

precise point upon which the New Hampshire Court sought authority.

The much more logical approach is to assume that Congressman Rogers' colleagues were not without sympathy for his position. At the same time, however, Congress was engaged in filling the "Attleboro Gap," a matter of expanding federal jurisdiction rather than expanding state jurisdiction. Consequently, the original Senate version of Part II did not include the savings clause. From its legislative history, one can determine that the savings clause was added by the House Commerce Committee. H.R. Rep. No. 1318, 74th Cong., 1st Sess. 18, 27 (1935). New Hampshire's Congressman Rogers explained his perception of the addition's purpose:

> the Senate bill as originally drawn would deprive certain states, I think five in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House Committee, and I hope when you come to it, Section 201 of part II, that you will grant us the privilege to continue, as we have been for 22 years, to exercise our state right over the exportation of hydroelectric energy transmitted across State lines but produced up there in the granite hills of old New Hampshire.

79 Cong. Rec. 10527 (1935).

This Gordian Knot is swiftly cut when one considers the state of the law at the time of the passage of Section 201(b). As this Court has noted, a review of the law from which the statute in question emerged is a valuable key to statutory construction. *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 112 (1948). In fact, at the time Part II of the Federal Power Act was being considered, there remained a

substantial issue as to the constitutionality of acts such as the New Hampshire statute. L. Smith, *The Power Policy of Maine*, 113-152 (1951). Presumably, Congress was aware of this uncertainty surrounding such acts. *See United States* v. *Neustadt*, 366 U.S. 696, 707-708 (1961).

If one could for a moment place oneself in the place of one of Congressman Rogers' colleagues, the following thought process seems best to fit the available facts. On the one hand, Congressman Rogers has made a plea for some consideration for what he regards as important and long-standing states' rights. On the other hand, there remain substantial legal questions as to whether or not these states had ever had those rights which the Congressman sought to have authorized in Part II of the Federal Power Act. It is submitted that Congress decided to give Congressman Rogers *exactly* what he asked for, namely, that whatever rights this state *lawfully* exercised prior to the passage of this Act would continue in existence. On the other hand, by the use of the qualifying term "lawful" in the statute, our hypothetical Congressman at the same time declined to grant the states any new rights. It is submitted that this explanation is perfectly logical, consistent with all known facts, and explains why the language of Section 201(b) reads as it does. As this Court pointed out in *Lynch* v. *Altworth-Stephens Co.*, 267 U.S. 364, 370 (1925):

> The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

In sum, Section 201(b) does not legitimize the PUC's unlawful attempt to garner for itself the energy which would other-

wise flow in interstate commerce in accordance with the existing FERC approved rates and contracts.

II. Part I of the Federal Power Act Preempts the New Hampshire Statute as Applied by the PUC.

Appellants herein believe that this Court need look no further than their argument in Part I in order to dispose of this matter. Accordingly, these Appellants will rely upon the arguments and authorities relied upon by the Appellants in Nos. 80-1208 and 80-1471 on this issue and incorporate them by reference herein for consideration by this Court in the event that the Court wishes to consider this issue.

III. Part II of the Federal Power Act Preempts the New Hampshire Statute as Applied by the PUC.

Appellants herein believe that this Court need look no further than their argument in Part I in order to dispose of this matter. Accordingly, these Appellants will rely upon the arguments and authorities relied upon by the Appellants in Nos. 80-1208 and 80-1471 on this issue and incorporate them by reference herein for consideration by this Court in the event that the Court wishes to consider this issue.

IV. The New Hampshire Statute, as Construed and Applied by the PUC and the New Hampshire Supreme Court, Violates the Privileges and Immunities of the Citizens of the State of Rhode Island and the Commonwealth of Massachusetts in Contravention of Article IV, § 2 of the United States Constitution.

Appellants herein believe that this Court need look no further than their argument in Part I in order to dispose of this

matter. Accordingly, these Appellants will rely upon the arguments and authorities relied upon by the Appellants in Nos. 80-1208 and 80-1471 on this issue and incorporate them by reference herein for consideration by this Court in the event that the Court wishes to consider this issue.

V. If Congress has Exempted the New Hampshire Statute from the Reach of the Commerce Clause, Then Congress has Violated that Clause by Favoring One State over Another in an Area of Fundamental Economic and Social Importance, or, Alternatively, Congress has Violated the Rights of the State of Rhode Island and Its Citizens and the Commonwealth of Massachusetts and Its Citizens, as Guaranteed by the Tenth Amendment or the Privileges and Immunities Clause.

Appellants herein believe that this Court need look no further than their argument in Part I in order to dispose of this matter. Accordingly, these Appellants will rely upon the arguments and authorities relied upon by the Appellants in Nos. 80-1208 and 80-1471 on this issue and incorporate them by reference herein for consideration by this Court in the event that the Court wishes to consider this issue.

Conclusion.

The decision below should be reversed.

Respectfully submitted,

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Nos. 80-1208, 80-1471, 80-1610

In the Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY, Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, et al.

COMMONWEALTH OF MASSACHUSETTS, et al., Appellants

v.

NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, et al.

DENNIS J. ROBERTS, II, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, et al., Appellants

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, et al.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF OF APPELLEES NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION AND STATE OF NEW HAMPSHIRE

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Questions Presented

The New Hampshire Public Utilities Commission ("PUC") has recently exercised its authority under a state statute originally enacted in 1913 to prohibit New England Power Company ("NEP") from selling outside the state any energy generated by NEP's federally licensed hydroelectric generating facilities in the State of New Hampshire ("New Hampshire"). NEP currently delivers the energy to an interstate transmission network for ultimate consumption in New Hampshire, the Commonwealth of Massachusetts ("Massachusetts"), and the State of Rhode Island ("Rhode Island"). The New Hampshire Supreme Court upheld the statute as applied by the PUC, and remanded the case for implementation. The appeal from the decision of the New Hampshire Supreme Court presents the following questions for review.

1. Does the New Hampshire statute as applied violate the Commerce Clause by imposing restrictions on the flow of locally generated hydroelectric energy out of New Hampshire?

2. Does the New Hampshire statute as applied violate the Privileges and Immunities Clause by denying to users located outside New Hampshire the opportunity to share in the benefits of locally generated hydroelectric energy?

3. Does the New Hampshire statute as applied violate the Supremacy Clause because the enactment of the Federal Power Act has preempted such state regulation?

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1208

NEW ENGLAND POWER COMPANY, Appellant

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, et al.

No. 80-1471

COMMONWEALTH OF MASSACHUSETTS, et al., Appellants

v.

NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, et al.

No. 80-1610

DENNIS J. ROBERTS, II, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, et al., Appellants

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, et al.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF OF APPELLEES NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION AND STATE OF NEW HAMPSHIRE

Summary of Argument

A. Commerce Clause

1. *Burden on interstate commerce.* New Hampshire has an interest in the flow of the Connecticut River, something not accruing to the riparian owner. This interest involves the use of the river for irrigation and power; and riparian owners of dams have only such rights in that flow as are granted by the state.

This interest in the potential energy distinguishes this appeal from cases such as *West v. Kansas Natural Gas Co.* (1911) and *Philadelphia v. New Jersey* (1978). Therefore, this appeal is more closely analogous to a line of cases beginning with *Geer v. Connecticut* (1896), which established that a state, because of its ownership of wild animals, could require that captured animals could be retained for consumption within the state. Later cases, such as *Foster-Fountain Packing Co. v. Haydel* (1928) and *Toomer v. Witsell* (1948), while arguably questioning the rationale of *Geer v. Connecticut,* still specifically embraced its limited holding.

Geer v. Connecticut was expressly overruled by *Hughes v. Oklahoma* (1979), which involved a statute forbidding the exportation of naturally bred minnows. This appeal, however, presents a factual situation distinguishable from *Hughes v. Oklahoma.* First, New Hampshire has more of an ownership interest in the Connecticut River than it does in wild animals which really have no owner until they are reduced to possession. Second, New Hampshire is more closely identified in its sovereign capacity with a public utility extracting hydroelectric energy than she is with a hunter or fisherman, since the utility is heavily regulated and has the power of eminent domain. To that extent, by analogy with *Reeves, Inc. v. Stake* (1980), which allowed South Dakota to retain state-produced cement, New Hampshire should be allowed to retain hydroelectric energy for consumption within the state.

2. *Congressional protection.* Even if, in 1981, *Hughes v. Oklahoma* compels the conclusion that a state may not restrict the exportation of hydroelectric energy, the law appeared otherwise in 1935. Accordingly, Congress reasonably believed that New

Hampshire could restrict such exportation when it enacted Part 1 of the Federal Power Act.

Section 201(b) of that Act clearly indicates a legislative intention to preserve the right of New Hampshire to restrict such exportation, at least as to preemption. In 1935 Congress could have failed to enact the savings clause as part of section 201(b). Again in 1978, when it amended that portion of section 201(b), a decision was apparently made not to withdraw the exemption. These enactments represent a legislative determination that such restrictions are appropriate exercises of concurrent state regulation. In the face of such determinations, this Court should defer to Congress to make the policy judgment of whether such restrictions are appropriate.

3. *Constitutional limitations.* The state appellants argue that the Constitution places certain limitations on Congressional power under the Commerce Clause. These appellants cite the Tenth Amendment, the Privileges and Immunities Clause and the Commerce Clause itself. The Privileges and Immunity Clause will be dealt with in section B of this summary.

The Commerce Clause does not present any inherent limitations on the powers of Congress. In *Prudential Insurance Co. v. Benjamin* (1946) this Court explicitly held that Congress may grant to the states the power to burden interstate commerce. In addition, Congress has enacted legislation that does not affect all states uniformly.

The Tenth Amendment also provides no bar to Congressional action in this appeal. Under the test established by *Hodel v. Virginia Surface Mining & Reclamation Assoc.* (1981), a federal statute must pass a three-part test. Under the first part, the federal statute must regulate states as states. In this appeal, the statute does not regulate the state appellants at all. Rather, it allows New Hampshire to regulate public utilities. Under the third part of the test, the federal statute must impair state governmental operations. Economic injury alone, as in this appeal, however, is insufficient to establish a violation.

B. Privileges and Immunities Clause

The Privileges and Immunities Clause, by its terms and under the cases, protects citizens of one state while subject to the jurisdiction of another. The New Hampshire statute as applied, however, does not treat citizens differently based on *citizenship*. Rather, it allows all consumers, located in New Hampshire to benefit from hydroelectric energy, regardless of citizenship. As a consequence, it also denies those benefits to out-of-state consumers, regardless of citizenship.

C. Supremacy Clause

1. *Part I of the Federal Power Act.* The provisions of Part I clearly establish that Congress envisioned some continuing state regulation of electric utilities. Therefore, since no such provision expressly grants or denies the power claimed by New Hampshire, analysis must turn to the purpose of the Act and the intent of Congress.

Part I is basically a licensing statute. The cases establish that the central purpose of Part I was to encourage the development of hydroelectric energy in harmony with other uses of navigable rivers such as transportation and recreation. In addition, the language of section 10(a) suggests that Congress intended to benefit interstate commerce by developing navigable rivers as highways. An intent to specifically benefit interstate commerce is not stated in connection with the development of water-power.

Congress was thus concerned more with the development of hydroelectric energy, rather than its transmission. The New Hampshire statute as applied does not inhibit such development.

2. *Part II of the Federal Power Act.* Part II establishes federal jurisdiction over the rates of interstate sales of electricity to distributors. It should be observed, however, that New Hampshire does not purport to regulate the rates of such sales in *other* states, although changes in rates may naturally result from the regulation.

If New Hampshire had actually forbidden the exportation of hydroelectric energy, presumably the ensuing intrastate sales

would be subject to her jurisdiction. The fact that New Hampshire chose a less restrictive measure should not invalidate the regulation.

The language of section 201(b) suggests that New Hampshire could retain power over hydroelectric energy even if that energy crosses state lines. This is reasonable given the difficulty and undesirability of the isolation of electric energy. Indeed, the 1978 amendment to section 201(b) require certain interconnections between utilities while preserving the protection of New Hampshire's statute. Congress therefore presumably intended that New Hampshire should have continuing jurisdiction over sales in New Hampshire even if some of the hydroelectric energy did in fact leave the state.

Argument

I. NEW HAMPSHIRE MAY CONDITION THE CONSTRUCTION OF DAMS AND THE EXTRACTION OF HYDROELECTRIC ENERGY FROM THE CONNECTICUT RIVER UPON COMPLIANCE WITH RSA 374:35 WITHOUT VIOLATING THE COMMERCE CLAUSE.

The transmission of electric current must, of course, be viewed as commerce. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 86 (1927). Thus, a state proposal to impose conditions on the flow of electric current across state lines gives rise to an inquiry under the Commerce Clause.

The recent case of *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980) outlines the inquiry.

> This appeal presents two distinct but related questions with respect to the validity of the challenged Florida statutes. The first is whether the statutes, viewed independently of federal legislation regulating the banking industry, burden interstate commerce in a manner contrary to the Commerce Clause. The second is whether Congress, by its own legislation in this area, has created an area in which the States may regulate free from Commerce Clause restraints.

Id. at 35 (footnote omitted). The second question becomes pertinent only if the Court reaches an affirmative answer to the first. *Id.*

To these two initial questions, Massachusetts and Rhode Island would add a third, which would become pertinent only if the Court reached an affirmative answer to the second. This third question is whether such Congressional legislation violates other provisions of the Constitution.

A. *The New Hampshire statute as applied does not burden interstate commerce in a manner contrary to the Commerce Clause.*

A long line of cases has established the principle that a state may not protect natural resources located within her borders from consumption by her sister states. *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (gas); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (gas); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (landfill space). These cases, however, all involve the situation where private interests have complete ownership of those resources.

Running water, such as that in the Connecticut River, contains the potential for hydroelectric energy. This potential energy may be converted into a marketable commodity just as wood or granite, two other New Hampshire resources. To the extent that the state has an ownership interest in the resource, one faces a question left expressly open in *Philadelphia v. New Jersey, supra*, 437 U.S. at 627, n.6.

The Connecticut River, up to the low water mark on the Vermont side, lies within New Hampshire. *Vermont v. New Hampshire*, 289 U.S. 593, 619-620 (1933). Title to the lands under water enures to the state within which they are situated. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 321-322 (1973) citing *Hardin v. Jordan*, 140 U.S. 371, 381 (1891). *See also* Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §§ 1301-1356 (1976 & Supp. 1979). The states are then left to determine the property rights of riparian owners. *Bonelli Cattle Co. v. Arizona, supra*, 414 U.S. at 319 citing *Arkansas v. Tennessee*, 246 U.S. 158, 176 (1918).

Under state law, New Hampshire may convey property rights in the bed of the Connecticut River. *New Hampshire Water Resources Board v. Lebanon Sand & Gravel Co.*, 108 N.H. 254, 259-260, 233 A.2d 828, 831 (1967). The flow of the Connecticut River, however, is not susceptible of private ownership. *St. Regis Paper Co. v. New Hampshire Water Resources Board*, 92 N.H. 164, 171, 26 A.2d 832, 838 (1942) citing *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 424 (1940).

This Court has faced the question of the asserted private rights of riparian owners in the potential energy in navigable rivers. Such attempts to assert direct ownership have been consistently denied. *See United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956); *United States v. Appalachian Electric Power Co.*,

supra; United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913). The private right to the use of the water depends not on the qualified title to the bed of a river or to the ownership of land bordering the river, but "must come from some right which that company has to construct and maintain such works in the river, such as dams, walls, dykes, etc., essential to the utilization of the power of the stream for commercial purposes." *United States v. Chandler-Dunbar Water Power Co., supra.*

NEP has been granted conditional rights to the potential energy of the Connecticut River. Since 1913, New Hampshire has prohibited the exportation of hydroelectric energy without the consent of the PUC. *See* RSA 374:35 and its precursors.[1] Since 1926 NEP or a predecessor company has obtained permission from the PUC to export hydroelectric energy from all plants in New Hampshire except Vernon Station, which was constructed prior to 1913.[2] *Appeal of New England Power Co.*, J.S.A. 3a.[3] Pursuant to its statutory authority, the PUC has, from time to time, approved NEP's requests to export hydroelectric energy. *See Connecticut River Power Co. & New England Power Co.*, 36 N.H.P.U.C. 302, 311-312 (1954); *Grafton Power Co.*, 12 N.H.P.S.C. 194, 200-201 (1929).

If New Hampshire seeks to ground her restrictions on the exportation of hydroelectric energy on her prior rights in the poten-

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[1]"RSA" refers to the New Hampshire Revised Statutes Annotated. RSA 374:35 and RSA 374:36 first appeared as part of an amendment to the 1911 law which established the New Hampshire Public Service Commission. 1913 N.H. Laws 145:17 (see Appendix below). In 1926 the law was amended to drop the exception for hydroelectric energy generated from the Connecticut River and codified as Public Law ("P.L.") 240:33 and 240:34. The statutes, as they existed in 1935, are set out in the Appendix. RSA 374:35 and 374:36 in their present form are also set out in the Appendix.

[2]The statutes apply only to additional hydroelectric energy generated after May 15, 1911. RSA 374:36.

[3]"J.S.A." refers to the Appendix to the Jurisdictional Statement filed by NEP in No. 80-1208. The decision of the New Hampshire Supreme Court is reported at 120 N.H. 866, 424 A.2d 807 (1980).

tial energy in the flow of the river, she must apparently first reconcile the cases dealing with similar restrictions on the exportation of wild animals. The early case of *Geer v. Connecticut*, 161 U.S. 519 (1896), established that a state may prohibit the exportation of wild animals caught within its borders. Subsequent cases confirmed and apparently broadened the rule. *See, e.g., Lacoste v. Department of Conservation*, 263 U.S. 545, 549 (1924) and cases cited therein.

In *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), the Court struck down a statute that prohibited the exportation of raw shrimp, but allowed locally processed shrimp to be exported. The Court distinguished *Geer v. Connecticut* on the basis that nearly all of the shrimp was in fact destined for sale in interstate commerce. The Court went on to explicitly reiterate the holding of *Geer v. Connecticut:* "As the representative of its people, the State might have retained the shrimp for consumption and use therein." *Foster-Fountain Packing Co. v. Haydel, supra*, 278 U.S. at 13.[4] Similar analysis was used in *Toomer v. Witsell*, 334 U.S. 385, 405-406 (1948) to declare that a state statute requiring owners of shrimp boats fishing in the maritime belt off South Carolina to dock at a South Carolina port and unload, pack and stamp their catch (with a tax stamp) before shipping it to another state burdened interstate commerce in violation of the Commerce Clause. In so doing, the Court quoted the above passage from *Foster-Fountain Packing Co. v. Haydel. Toomer v. Witsell, supra*, 334 U.S. at 404-405.[5]

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[4]Mr. Justice McReynolds stated the position even more forcefully in his separate opinion. "Manifestly, Louisiana has full power absolutely to forbid interstate shipments of shrimp taken within her territory." *Id.* at 15.

[5]As late as 1978, the Court was still citing *Foster-Fountain Packing Co. v. Haydel* for the proposition

> that the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, *but destined for interstate commerce*. Like Louisiana's shrimp in Foster Packing, Alaska's oil and gas here are bound for out-of-state consumption.

Hicklin v. Orbeck, 437 U.S. 518, 533 (1978) (emphasis added).

The dissent in *Geer v. Connecticut, supra,* 161 U.S. at 539-540, questioned the theory of ownership of wild fish, birds, or animals. This theme echoed through the later decisions of *Toomer v. Witsell, supra,* 334 U.S. at 402, and *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977). *Cf. Missouri v. Holland,* 252 U.S. 416, 434 (1920) (police power preferred to ownership theory as basis of decision). Finally, in 1979, *Geer v. Connecticut,* was expressly overruled in *Hughes v. Oklahoma,* 441 U.S. 322 (1979). *Hughes v. Oklahoma* involved a statute which provided that no person could transport or ship for sale outside Oklahoma minnows which were procured within state waters. The court dismissed the theory of state ownership of wild animals as a 19th century legal fiction and went on to evaluate the statute under the general rule as set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The instant appeal is distinguishable from *Hughes v. Oklahoma,* however, for several reasons. First, the nature of the interest that a state has in the flow of her rivers, although in many ways similar to her interest in wild animals, differs in certain respects. Wild animals may be thought to have no owner "until they are reduced to possession by skillful capture." *Hughes v. Oklahoma, supra,* 441 U.S. at 334 quoting *Douglas v. Seacoast Products, Inc., supra,* 431 U.S. at 284. Under Roman law they were considered *res nullius,* no one's thing. Running water for irrigation or power, however, would fall under the heading of *res communes,* something shared in common by all. *See* Pound, *An Introduction to the Philosophy of Law* 197-198 (1922).[6]

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[6]Pound, however, counsels against stringent regulation of *res communes* by declaring that they are the property of the state. *Id.* at 198-199. *But see United States v. Texas,* 339 U.S. 707 (1950):

> "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. . . ."

In *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), the Court sustained a New Jersey statute that prohibited any person from transporting the waters of any fresh water pond or stream of the state into any other state. Appellant had attacked the statute under the Due Process, Equal Protection, Commerce, and Privileges and Immunities Clauses. Although the lower court had rested its analysis on the residuum of public ownership in the state, Mr. Justice Holmes in delivering the opinion of the Court placed authority on the broader ground of police power. *Id.* at 355. In so doing, however, the Court gave New Jersey an essentially free hand to control state waters.

> We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. ***It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.***

Id. at 356-357 (emphasis added). *Cf. United States v. Twin City Power Co., supra; United States v. Appalachian Electric Power Co., supra; United States v. Chandler-Dunbar Water Power Co., supra.*

> . . . Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. In other words, we assume that it then had the *dominium* and *imperium* in and over this belt which the United States now claims.

Id. at 717 quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935). *United States v. Texas* was decided just two years after *Toomer v. Witsell* where the Court had cited Pound in discussing ownership of fish and game. *Toomer v. Witsell, supra*, 334 U.S. at 402 n. 37.

The second distinction lies in the nature and extent of the state involvement in the instant appeal. Had New Hampshire thought she had no power to restrict the transmission of hydroelectric energy out of state, she might have been tempted to take a more active role in developing her sources of hydroelectric energy.[7] If New Hampshire had originally determined to purchase or build her own hydroelectric generating facilities, she could presumably withhold the electricity for use by her citizens under *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). That case involved the decision by South Dakota to forbid the export of cement produced at state-owned factories. It does not indicate whether South Dakota purchased the raw materials for processing from private sources. To the extent that New Hampshire owned both the resource and the processing facility, New Hampshire would appear to be in a stronger position.

Indeed, New Hampshire might well meet the threshold issue identified by the dissent in that case. Traditional distinctions be-

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[7]At its most recent session, the New Hampshire General Court passed a law giving the New Hampshire Water Resources Board explicit power to take a more active role in the development of hydroelectric production facilities. 1981 N.H. Laws ch. 505. For example, the Water Resources Board may now "investigate and identify facilities for the production and utilization of hydro-energy," RSA 481:3,I as amended by 1981 N.H. Laws 505:3, acquire and use such facilities, RSA 481:3,III as amended by 1981 N.H. Laws 505:3; construct, reconstruct, maintain and operate hydro-energy production facilities, RSA 481:2,V and RSA 481:3,V as amended by 1981 N.H. Laws 505:2 and 505:3 respectively, and "apply for and hold all necessary permits and licenses, and to meet all requirements of the Federal Energy Regulatory Commission in developing hydro-energy production facilities," RSA 481:3,X as amended by 1981 N.H. Laws 505:3. The Water Resources Board is also directed to insert in all its contracts for the operation, use and distribution of hydro-energy a provision "that in the event of a shortage crisis, as determined by the governor and council, in either the water resources of the state or the capacity to fulfill the electrical requirements of the state, the governor and council may suspend the terms of contracts which provide services outside of the state to fulfill the needs and requirements of the citizens of New Hampshire." RSA 481:8,III as amended by 1981 N.H. Laws 505:6.

tween governmental and proprietary functions arose primarily in the area of tort liability for local governmental entities and entailed little uniformity. *See, e.g., Restatement of Torts, Second* § 895C, comment e (A.L.I. 1979). Accordingly, in *Brush v. Commissioner*, 300 U.S. 352 (1937), the Court rejected analysis under state tort law and held that, for purposes of determining immunity from federal taxation, the municipal supply of water was considered a governmental activity. The Court declined to establish any fixed criteria for determining the classification of a given activity. *Id.* at 356-366. The conservation and distribution of electricity, like water, would appear to be imbued with a strong public interest.[8] *See id.* at 366. Without electricity, many essential governmental functions could hardly be provided.[9] *See id.* at 370-371.

As history would have it, however, New Hampshire did not decide to get into the business of producing hydroelectric energy. Instead, she authorized and encouraged private corporations to develop the hydroelectric potential in the Connecticut River.

Without doubt, all such corporations are public utilities. *See* RSA 362:2; *Opinion of the Justices*, 84 N.H. 559, 149 A. 321 (1930); *State v. New Hampshire Gas & Electric Co.*, 86 N.H. 16, 163 A. 724 (1932). As a public utility, each corporation is imbued with certain attributes of the sovereign such as the power to take land by eminent domain. *See* RSA 371:1; *Public Service Co. v. Shannon*, 105 N.H. 67, 192 A.2d 608 (1963).[10] In allowing such

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[8]*See, e.g.*, section 201(a) of the Federal Power Act: "It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest. . . ." 16 U.S.C. § 824(a) (1976).

[9]One may observe, of course, that the government of New Hampshire is not likely to grind to a halt if it is not allowed to harvest the monetary benefits of its cheap hydroelectric energy. Higher costs for electricity, however, may well have an impact on the way the government structures its affairs. *Cf. National League of Cities v. Usery*, 426 U.S. 833 (1976).

[10]RSA ch. 371 was recently repealed, however, apparently by accident. *See* 1981 N.H. Laws 493:18. Chapter 483 was designed to transfer

corporations to supply an essential public service, New Hampshire has since 1926 expressly conditioned the exportation of hydroelectric energy generated from the Connecticut River on the permission of the PUC.[11]

These public utilities may thus be viewed as more closely identified with the sovereign than were the minnow dealers in *Hughes v. Oklahoma*. To that extent, the instant appeal more closely resembles the situation presented in *Reeves, Inc. v. Stake*.

B. *Congress has created an area where New Hampshire may regulate the exportation of hydroelectric energy free from Commerce Clause restraints.*

If the Court determines that the New Hampshire statute restricting the export of hydroelectric energy burdens interstate commerce in a manner contrary to the Commerce Clause, it must then consider whether Congress, by its own legislation, has allowed New Hampshire to impose such restrictions free from Commerce Clause restraints.

> Congress, of course, has power to regulate the flow of interstate commerce in ways that the States, acting independently, may not. And Congress, if it chooses, may exercise this power indirectly by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.

Lewis v. BT Investment Managers, Inc., supra, 447 U.S. at 44.[12] Therefore, to the extent that the holding of *Hughes v. Oklahoma* can be read to encompass and protect the exportation of

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the duty of establishing just compensation from the PUC to the Eminent Domain Commission in condemnation proceedings brought by utilities.

[11] *See* footnote 1, *Supra*. None of the generating facilities affected by this appeal were built prior to 1927.

[12] *See also H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 542-543 (1949); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 423-424 (1946); *International Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945), *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

hydroelectric energy, New Hampshire must seek Congressional confirmation of her power to restrict such exportation.

Accordingly, New Hampshire looks to the provisions of section 201(b) of the Federal Power Act. In its present form, that section provides in pertinent part:

> *The provisions of this subchapter* [Part I] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) *shall not* apply to any other sale of electric energy or *deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.*

16 U.S.C. § 824(b)(1) (Supp. 1979) (emphasis added). Although this language is not that usually used by a legislature when authorizing an act, the history of the enactment of that section demonstrates that Congress intended to clothe New Hampshire with authority over the exportation of hydroelectric energy.

Section 201(b) had its genesis in Senate Bill 2796 which was introduced to the House of Representatives on June 27, 1935. That version did not contain any reference to state authority over the exportation of hydroelectric energy.[13] The bill, amended to pro-

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[13] 79 Cong.Rec. 10315 (June 27, 1935):

> The provisions of this part shall apply to the transmission of electric energy in interstate commerce, to the sale of electric energy at wholesale in interstate commerce, and to the production of electric energy for such transmission or sale, but shall not apply to the retail sale of such energy in local distribution. The Commission shall have jurisdiction over all facilities for such production, transmission, or sale of electric energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, except facilities used only for the production or transmission of electric energy in intrastate commerce or in local distribution or for the use of the producer or transmitter. Every person who owns or operates facilities subject to the jurisdiction of the Commission under this part shall be subject to the provisions of this part and the part next following.

vide such authority, was passed by the House of Representatives on July 9, 1935.[14] The clause was inserted by the House Committee on Interstate and Foreign Commerce.[15]

Just prior to its passage, New Hampshire Representative William A. Rogers urged his colleagues to adopt the amended version. In discussing the language at issue in this case, Representative Rogers said:

> Just one further word. I do want to call attention, if I have a moment, to the fact that as a result of the service rendered by the junior Senator from New Hampshire on the public service commission of our State, we, for a long time, have had a public service commission which properly protects the rights of the citizens as against these damnable curses; but the Senate bill as originally drawn would deprive certain States, I think five in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House committee, and I hope when you come to it, section 201 of part II, that you will grant us the privilege to continue, as we have been for 22 years, to exercise our State right over the exportation of hydroelectric energy

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[14]79 Cong.Rec. 10830 (July 9, 1935):

> The provisions of this part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce but shall not apply to any other sale of electric energy or deprive a State or State Commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction over the facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

[15]H.R.Rep. No. 1318, 74 Cong. 1st Sess. 27 (1935). The Committee met in executive session, however, so that the minutes are unavailable for review at this time.

transmitted across State lines but produced up there in the granite hills of old New Hampshire. [Applause.]

[Here the gavel fell.]

79 Cong.Rec. 10527 (July 1, 1935). The language at issue was retained by the Conference Committee. *See* Conference Committee Report, 79 Cong.Rec. 14600, 14614 (August 24, 1935).

There can be little doubt that the stated exception in section 201(b) was aimed at the 1935 predecessor of RSA 374:35 and similar legislation then in existence.[16] This should be clear from the plain reference to the exportation of hydroelectric energy. In addition, Representative Rogers in the above-quoted passage specifically refers to a state power in existence for 22 years governing the exportation of hydroelectric energy. This presumably refers to the legislation enacted in 1913, 22 years prior to 1935, which later became RSA 374:35. *See* 1913 N.H. Laws 145:17.

It is reasonable to infer from the legislative history that in 1935 Congress believed that a state could control the exportation of hydroelectric energy free of Commerce Clause restraints. Representative Rogers apparently believed so. In the above-quoted passage, Representative Rogers was afraid that the bill would deprive certain states of those rights ***which they already had*** over the exportation of hydroelectric energy. He spoke in terms of ***continuing*** to exercise a state right over such exportation.

This assumption is entirely consistent with the cases cited earlier. In 1935, *Geer v. Connecticut* was still good law. *Foster-Fountain Packing Co. v. Haydel* had confirmed the states' power to retain their communally-owned resources for their own consumption. The first direct questioning of the ownership theory in *Toomer v. Witsell* was still over a dozen years away. In

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[16]At least three other state statutes governing the exportation of hydroelectric energy appear to have come under this exception. *Safe Harbor Water Power Corp.*, 5 F.P.C. 221, 235 (1946). They included: Me.Rev.Stat. ch. 68, § 1 (1930); Wis.Stat. § 31.27 (1931); and 1929 W.Va. Acts ch. 58, § 6*(f)*. These statutes are set forth in the Appendix. *See also* footnote 31, *infra*.

fact, *Geer v. Connecticut* would not be overruled until over forty years later.[17]

If, however, Congress did not believe that the states had that power, the inserted language and the speech of Representative Rogers must be viewed in a different light. The phrase "lawful authority now exercised" as used in the section could not refer to lawfulness under the Constitution. If it did, the purported exception would be without any meaning or effect. Thus, the phrase must be read to use "lawful" in the sense of "enacted into law." Under that construction, a statute would apparently be considered lawful if appropriately enacted until invalidated by a court. If Congress believed those statutes were unconstitutional, however, in order to make section 201(b) meaningful, Congress must have intended, in the words of Representative Rogers, to "grant" to New Hampshire a "privilege" which she did not have: that is, to continue to exercise power over the exportation of hydroelectric energy, free of Commerce Clause restraint. New Hampshire would need this grant, in addition to the exemption from preemption, in order to have any rights at all.

Appellants may argue that Congress preferred to delegate authority to the courts to determine on a case-by-case basis the lawfulness of the authority a state exercised over the exportation

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[17]Appellants may argue that the instant appeal should be analogized to the situation presented to the Court in *United States v. Public Utilities Commission of California*, 345 U.S. 295 (1953). That case involved the question of whether section 20 of the Federal Power Act, 16 U.S.C. § 813 (1976), (set forth in the Appendix), contained a grant of authority to Congress so that California might circumvent the holding in *Public Utilities Commission v. Attleboro Steam & Electric Co.* At the time of the enactment of section 20, however, the jurisdictional line had not been determined between local and national authority. *United States v. Public Utilities Commission of California, supra*, 345 U.S. at 303. In this appeal, the relevant case determining state rights under the Commerce Clause was specifically reversed many years after section 201(b) was enacted. In addition, the language and history of section 201(b) suggests that Congress considered a much more specific and narrow class of state regulation, than envisioned under section 20.

of hydroelectric energy. If Congress had intended to do so, however, it could have perhaps used more explicit language. For example, Congress could have said: "The provisions of this subchapter . . . shall not . . . deprive a State or State commission of any *otherwise* lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." If Congress harbored any such doubts about the constitutionality of New Hampshire's statute, they certainly do not appear in the language of section 201(b) or in the remarks of Representative Rogers.

Thus, as stated above, the language and history of section 201(b) most reasonably suggests that Congress intended to preserve what it believed to be a lawful exercise of state power. The adoption of the exemption therefore amounts to a legislative determination that the exercise of such power by a state is not unreasonable in light of federal policy and federal control over hydroelectric energy. If Congress felt otherwise in 1935, it need not had created the exemption at all.

If the "evolutionary process" [18] of judicial analysis under the Commerce Clause has carried us away from the prevailing view in 1935, the legislative determination may need review as well. If Congress now feels that New Hampshire should not exercise such power, it may revoke the exemption.[19] But such modification in

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[18] *Hughes v. Oklahoma, supra,* 441 U.S. at 326.

[19] In this connection, it is interesting to note the 1978 amendments to the Federal Power Act. Public Utilities Regulatory Policies Act of 1978, P.L. 95-617, 92 Stat. 3117 ("PURPA"). Those amendments took away a portion of the broad exemption that had been granted under section 201(b) to state authority over the exportation of hydroelectric energy. PURPA § 204(b)(1), 92 Stat. 3140, 16 U.S.C.A. § 824(b). Beginning in 1978, those states would be subject to the provisions of sections 210, 211 and 212 of the Federal Power Act, 16 U.S.C. §§ 824i, 824j & 824k (Supp. III 1979), which deal with the interconnection authority and wheeling authority of FERC. This special exception would hardly be necessary if Congress did not continue to feel that the original exemption carried some effect.

the face of an apparent legislative policy determination, should be for Congress, not the Court, to make.[20]

C. *The delegation by Congress of the authority to regulate the exportation of hydroelectric energy does not violate the Commerce Clause, the Tenth Amendment or the Privileges and Immunities Clause.*

Massachusetts and Rhode Island have raised the question of whether there are any constitutional limitations on the power of Congress to delegate authority to a state to regulate interstate commerce.[21] None of the cited provisions, however, place limitations on the power of Congress which would be relevant to this appeal.

1. *Commerce Clause.* The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. Const. Art I, § 8, cl. 3. As stated in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 423 (1946), the Clause gives rise to two distinct lines of analysis. First, it contains a grant of plenary and supreme authority over interstate commerce to Congress.

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[20]*Cf. Commonwealth Edison Co. v. Montana*, 49 U.S.L.W. 4957, 4962, 4969 (July 2, 1981); *Massachusetts v. United States*, 435 U.S. 444, 456 (1978). Although discussing a question of State taxation, the Court in *Commonwealth Edison Co. v. Montana* felt constrained to allow Congress to determine when particular State actions are thought to be contrary to federal interests. *Id.* at 4962. In his concurring opinion, Mr. Justice White observed that "Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. It is also very much aware of the Nation's energy needs . . . ." Id. at 4969. New Hampshire, like Montana, does not have the political power to impose its will on the rest of the country.

[21]Massachusetts has raised and briefed these issues; and Rhode Island has adopted those portions of the Massachusetts brief. For ease of reference during the balance of part I and all of part II, this brief will refer only to Massachusetts. The arguments of course apply with equal force to Rhode Island.

> The only limitation it places upon Congress' power is in respect to what constitutes commerce, including whatever rightly may be found to affect it sufficiently to make congressional regulation necessary or appropriate.

Id. (footnote omitted). Second, it contains an "implied prohibition" on the power of the states to burden interstate commerce.

> The one limitation bounds the power of Congress. The other confines *only* the powers of the states.

Id. (emphasis added).[22]

Massachusetts appears to have two related arguments. First, Massachusetts may argue that Congress does not have the power to allow a state to unduly burden interstate commerce in ways which would create "tendencies toward economic Balkanization," *Hughes v. Oklahoma, supra,* 441 U.S. at 325, or which would frustrate the principle that "our economic unit is the nation," *H.P. Hood & Sons, Inc. v. Du Mond, supra,* 336 U.S. at 537. *See* Brief of Massachusetts 84. This view appears to invoke the implied prohibition directed at the states against the grant of power directed to Congress. Taken to its logical conclusion, however, this view would place an enormous restriction on Congressional power under the Commerce Clause.

> In this view the limits of state power to regulate commerce in the absence of affirmative action by Congress are also the limits of Congress' permissible action in this respect, whether taken alone or in coordination with state legislation.
>
> Merely to state the position in this way compels its rejection. So conceived, Congress' power over commerce would be nullified to a very large extent.

Prudential Insurance Co. v. Benjamin, supra, 328 U.S. at 422.

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[22] *See also Western & Southern Life Insurance Co. v. State Board of Equalization,* 49 U.S.L.W. 4542, 4543 (May 26, 1981) (emphasis in original): "Our decisions do not, however, limit the authority of *Congress* to regulate commerce among the several States as it sees fit."

Massachusetts' second argument is somewhat more restricted in scope. Reduced to its essentials, the argument calls for a limiting of Congressional authority under the Commerce Clause to those cases where Congress delegates powers uniformly among the states. No case on point is cited, however. Indeed, Congressional delegation of power to all states would be more burdensome on interstate commerce than the delegation of power to only one or two. This would create "the anomaly . . . that statutes imposing the most extreme burdens on interstate commerce . . . [would be] the most immune from challenge." *Hughes v. Oklahoma, supra,* 441 U.S. at 335.

The argument also fails to consider the problems inherent in determining uniformity. A statute that allows all states to regulate the exportation of raw shrimp would hardly have uniform application. Even a statute that allows all states to regulate the exportation of hydroelectric energy would benefit some states more than others.[23] Indeed, this Court has sustained Congressional actions pursuant to the Commerce Clause which provided disparate treatment in the application of various protective measures. *See Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 616 (1950) (sugar production); *South Carolina v. Katzenbach*, 383 U.S. 301, 328-329 (1966) (voting rights); *Hodel v. Indiana*, 49 U.S.L.W. 4667, 4671 (June 15, 1981) (prime farmland).

As stated above, Congress has not determined to reverse its earlier acceptance of the New Hampshire statute. This Court should therefore defer to Congress the determination of appropriateness of the authority granted by section 201(b).

2. *Tenth Amendment.* The Tenth Amendment by its terms deals with the rights of a state vis-á-vis the federal government. Under the Amendment, "Congress may not exercise power in a

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[23]In fact, in a limited sense, the section 201(b) delegation of power would be uniform since it applied to all states equally, though only a limited number who had already undertaken regulation would benefit. It may perhaps be compared with a grandfather clause which acts to protect those states which have demonstrated a willingness or desire to regulate hydroelectric energy.

fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547, n.7 (1975). To be invalid, the statute must regulate a state in a way which interferes with sovereign state functions. *See Id.*

The recent case of *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 49 U.S.L.W. 4654, 4660 (June 15, 1981) sets out a three-part test culled from *National League of Cities v. Usery, supra*. Under the first prong of the test, the Court must determine whether the statute regulates the "States as States." The federal statute, however, does not regulate *Massachusetts* at all. Rather, it allows *New Hampshire* to regulate certain public utilities. *See Hodel v. Virginia Surface Mining & Reclamation Assoc., supra.*

The third prong of the test involves a determination whether the states' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional functions. Again, the federal statute does not directly regulate Massachusetts. Even if the New Hampshire statute as applied has a "measurable impact" on Massachusetts' economy, "this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment." *Id.* at 49 U.S.L.W. at 4661 n.33.

Massachusetts' real objection, of course, is that section 201(b) treats different states differently. To the extent that such absence of uniformity is the basis for claims under the Tenth Amendment, analysis under the Amendment would not seem to add significantly to the arguments advanced as limitations to Congressional power directly from the Commerce Clause, as discussed above.

3. *Privileges and Immunities Clause.* Massachusetts finally argues that the Privileges and Immunities Clause may constitute a limitation of the power of Congress under the Commerce Clause. Be that as it may, the validity of the New Hampshire statute under the Privileges and Immunities Clause will be discussed below in section II. If the statute as applied does not violate that Clause, as will be shown below, Congress should be able to give it protection from the "implied prohibition" of the Commerce Clause.

II. BY SECURING THE BENEFITS OF RELATIVELY INEXPENSIVE HYDROELECTRIC ENERGY FOR USERS WITHIN THE STATE, NEW HAMPSHIRE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE.

It is well settled that the Privileges and Immunities Clause protects people, not states. *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1975). It may be understood, however, that Massachusetts makes her arguments as *parens patriae* on behalf of her citizens. *See id.* and cases cited therein.

The Privileges and Immunities Clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const., Art. IV, cl. 1, § 1. As the language of that Clause suggests, such protection extends to citizens of one state while *in* other states. This Court has never held that New Hampshire must afford to Massachusetts citizens, while they are in Massachusetts, the privileges afforded by New Hampshire to its citizens while in New Hampshire.

The cases seem uniformly to recognize the requirement that a citizen of one state must be physically within another state in order to invoke the Clause. The Clause "insures to [citizens of one state] *in other States* the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property. . . ." *Paul v. Virginia*, 75 U.S. 168, 180 (1868) (emphasis added). "The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one state in a condition of alienage *when he is within* or when he removes to another State . . . ." *Blake v. McClung*, 172 U.S. 239, 256 (1889) (emphasis added). "[The Clause] was designed to insure to a citizen of State A *who ventures into* State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (emphasis added). "The Clause thus establishes a norm of comity without specifying the particular subjects as to which citizens of one State *coming within* the jurisdiction of another are guaranteed equality of treatment." *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975) (emphasis added).

Massachusetts, seems to argue, however, that the effect of the New Hampshire statute is to "impose a tax through the imposition of a higher rate for electricity in Massachusetts." Brief of Massachusetts 74. This is, to say the least, a curious line of reasoning. It seems to imply that Massachusetts citizens simply by consuming electricity are being subjected to the taxing jurisdiction of New Hampshire.

The New Hampshire statute, however, is simply not a taxing statute. To the extent that one may want to look at the effects of the statute, a more useful analogy may be to a tax on resources, not on individuals. For example, a tax imposed on the severance of coal was upheld in *Commonwealth Edison Co. v. Montana*, 49 U.S.L.W. 4957 (July 2, 1981). A tax on hydroelectric energy in the amount of the difference between its cost and the average cost of other sources of energy might have a similar effect on purchasers not located in New Hampshire as the present statute would. These effects would affect on purchasers as purchasers, however, not as citizens.

Massachusetts citizens, while in New Hampshire, may consume New Hampshire produced hydroelectric energy. In this respect they are treated no differently from New Hampshire citizens. New Hampshire citizens, while in Massachusetts, may not consume New Hampshire produced hydroelectric energy. In this respect they are treated no differently from Massachusetts citizens.

The essential flaw in Massachusetts' reasoning may perhaps rest on an unstated assumption that Massachusetts citizens have a right to have the benefits of hydroelectric energy flow out of New Hampshire and into Massachusetts. Such right, if it exists at all, would seem more properly to come from the Commerce Clause, not from the Privileges and Immunities Clause.

III. THE NEW HAMPSHIRE STATUTE AS APPLIED DOES NOT VIOLATE THE SUPREMACY CLAUSE BECAUSE CONGRESS DID NOT INTEND TO PREEMPT SUCH REGULATION BY ENACTING THE FEDERAL POWER ACT.

The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2. "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 49 U.S.L.W. 4562, 4568 (May 26, 1981) citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Where the field which Congress is said to have preempted has been traditionally occupied by the states, this assumption "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the Courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) quoting *United States v. Bass*, 404 U.S. 336, 349 (1971). The regulation of electric utilities has traditionally been performed by the states. *United States v. Public Utilities Commission of California*, 345 U.S. 295, 302-303 (1953).

A Congressional purpose to displace state law may be evidenced in several ways. A number of these ways are set forth in *Maryland v. Louisiana, supra*, 49 U.S.L.W. at 4568.

A. *Part I of the Federal Power Act does not preempt the New Hampshire statute.*

Part I of the Federal Power Act was originally enacted in 1920 as the Federal Water Power Act. 41 Stat. 1063. Part I is presently codified as 16 U.S.C. §§ 792-823 (1976).

An analysis of the provision of Part I indicates that the scheme of federal regulation is not "so pervasive as to make reasonable the inference that Congress left no room for the states. . . ." *Rice v. Santa Fe Elevator Corp., supra,* and cases cited. Indeed, Part I leaves to the states a portion of their traditional jurisdiction. *First Iowa Hydro-Electric Coop. v. FPC,* 328 U.S. 152, 171 (1946).

Section 9(b) of the Act, 16 U.S.C. § 802(b) (1976), requires an applicant for a license under the Federal Power Act to give evidence of compliance with state laws.[24] While the specific references in this section "neither add anything to nor detract anything from the force of the local laws, if any, on those subjects," *First Iowa Hydro-Electric Coop. v. FPC, supra,* 328 U.S. at 178, the provision plainly indicates that Congress expected that some state regulation would survive.[25]

In section 19 of the Act, 16 U.S.C. § 812 (1976), Congress specifically provided for the regulation of intrastate sales of power generated at a licensed facility by the state in which the sale was made.[26] In addition, section 20 of the Act, 16 U.S.C. § 813 (1976), while insufficient to vest the states with authority to regulate interstate sales in wholesale quantities to distributing

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[24]16 U.S.C. § 802(b) provides:

> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

[25]It may be remembered that in 1920, New Hampshire could presumably have preserved all hydroelectric energy for local consumption under *Geer v. Connecticut.* At that time, not even *Foster-Fountain Packing Co. v. Haydel* had been decided.

[26]16 U.S.C. § 812 provides in pertinent part:

> As a condition of the license, every licensee under this chapter which is a public-service corporation, or a person, association, or

companies for resale to consumers, nevertheless allows states the power to regulate sales across the state line direct to customers. *United States. v. Public Utilities Commission of California* 345 U.S. 295, 303 (1953) citing *Public Utilities Commission v. Attleboro Steam & Electric Co., supra,* 273 U.S. at 89.[17]

Thus, there exist a number of sections which anticipate state regulation of hydroelectric energy. While no provision of Part I specifically authorizes a state to regulate the exportation of hydroelectric energy, no provision specifically excludes it. Appellants therefore seek an implied exclusion based on the purposes of Part I.

Part I is essentially a licensing statute focusing on the construction of dams. *See* section 23(b), 16 U.S.C. § 817 (1976).[18] In Part I Congress applied *"all"* of its constitutional authority "to the *development* of the navigable waters of the United States." *First Iowa Hydro-Electric Coop. v. FPC, supra,* 328 U.S. at 171-172 (emphasis added).

> The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power uses which, while unregulated, might well be contradictory rather than harmonious.

FPC v. Union Electric Co., 381 U.S. 90, 98 (1965).

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corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. . . .

[17] 16 U.S.C. § 813 is set forth in the Appendix.

[18] 16 U.S.C. § 817 is set forth in the Appendix.

Section 10(a), 16 U.S.C. § 803(a) (1976),[29] provides a good illustration of the principles set forth in the above-quoted cases.

Section 10 establishes certain conditions with which applicants must comply in order to qualify for a license. Section 10(a) directs FERC to consider whether the project will be best adapted to a comprehensive plan:

> (1) "for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce,"
>
> (2) "for the improvement and utilization of water-power development, and"
>
> (3) "for other beneficial public uses, including recreational purposes."

It is significant that section 10(a) uses the term "waterway" in connection with the phrase "interstate or foreign commerce," rather than the defined term "navigable waters." *See* section 3(8), 16 U.S.C. § 796(8) (1976). This would apparently suggest that the essential "use or benefit" which would inure to "interstate or foreign commerce" from the navigable water would be as a highway. On the other hand, water-power development is not expressly reserved "for the use or benefit of interstate or foreign commerce."

Under the above analysis, therefore, the central issues under Part I are whether the New Hampshire statute as applied blocks the development of the Connecticut River and whether it creates dissonance among the various uses of the Connecticut River. Unlike the situation presented in *First Iowa Hydro-Electric Coop. v. FPC*, the PUC order does not prohibit the development of any project. In addition, the PUC order does not create any conflict among the possible uses of the Connecticut River.

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[29] 16 U.S.C. § 803(a) provides in part:

> All licenses issued under this subchapter [Part I] shall be on the following conditions:
>
> (a) Modification of plans, etc., to secure adaptability of project
>
> That the project adopted, including the maps, plans, and

B. *Part II of the Federal Power Act does not preempt the New Hampshire statute.*

In 1927, the Court in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, held that states are prohibited by the Commerce Clause from regulating interstate wholesale rates. As a direct result, in 1935 Congress enacted Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k (1976 & Supp. III 1979), to establish federal jurisdiction over such sales. *United States v. Public Utilities Commission of California, supra*, 345 U.S. at 311. *See* also *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215 (1964).

Section 201(b) of the Federal Power Act grants FERC jurisdiction over "the sale of electric energy at wholesale in interstate commerce, but . . . not [over] any other sale of electric energy . . . ." Thus, wholly intrastate sales and interstate sales to consumers are exempt from such regulation.

Appellants assert that the New Hampshire statute as applied amounts to a regulation of interstate wholesale sales. In determining such an effect, however, it would be inaccurate to focus on the sales by NEP to distributors outside of New Hampshire. The statute as applied does not directly regulate such sales. The order of the PUC as upheld below deals only with sales within New Hampshire. To be sure, NEP may find it necessary or desirable to seek modifications in existing rates and contracts concerning sales outside of New Hampshire. While these consequences may flow naturally from the statute as applied, the PUC order did not specifically require any of them.

If both the state and the federal government regulate a utility, it would be expected that any regulatory action by one authority would change the circumstances of the utility and alter subsequent regulation by the other authority. Lawful state regulation

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specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit or interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes, ...

may affect federal regulation in any number of ways.[39] Such indirect effects, however, have never been held to be an invasion of the exclusive jurisdiction of FERC.

We must therefore turn attention to sales within New Hampshire. The PUC order by its terms has a more direct impact on wholesale sales within New Hampshire.

If New Hampshire had exercised the full extent of the authority under her statutes and actually required NEP to keep the hydroelectric energy solely for intrastate consumption, New Hampshire would apparently be free to regulate the rates of such sales. To the extent that appellants hang FERC's exclusive jurisdiction over sales within New Hampshire on the fact that New Hampshire had not required NEP to sever its transmission lines, appellants would again create "the anomaly . . . that statutes imposing the most extreme burdens . . . [would be] the most immune from challenge." *Hughes v. Oklahoma, supra,* 441 U.S. at 335.

Even if the power to actually retain all the hydroelectric energy does not include the power to retain only the economic benefits, the language of section 201(b) would seem to indicate that New Hampshire does have the power to exercise authority even after the energy has crossed state lines. Section 201(b) (2) provides that the provisions of Part II shall not deprive a state of lawful authority "over the exportation of hydroelectric energy *which is transmitted across a State line.*" The emphasized portion would

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[39]For example, if the PUC refuses to include the cost of construction work in progress in the rate base of a utility, that reduced rate base may have an effect on the risk of investment in that utility and consequently upon the cost of common equity. On the other hand, if the PUC sets the rates of another utility at the higher edge of the zone of reasonableness, this may also affect the cost of common equity for that utility. When either of these utilities applies before FERC for a wholesale rate increase, FERC would determine those rates on the circumstances presented by the utilities. Similarly, the PUC order may change the circumstance presented by NEP when it applies for new rates in Massachusetts and Rhode Island; but this effect standing alone does not amount to an invasion of the exclusive wholesale rate fixing authority of FERC.

appear to be redundant unless Congress intended that the states should have some continuing regulatory power even if the energy physically crosses state lines.[31]

This is not an unexpected flexibility given the nature of electrical energy. It would appear to be very difficult to insulate a utility from the interstate flow of electricity. *See FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972). Indeed, certain interconnections may be ordered by FERC notwithstanding the section 201(b) protection, as a result of the 1978 amendments.[32] If the protection, preserved by those amendments, is to have any continued effect, it must be inferred that Congress understood section 201(b) to give a state a certain amount of control over hydroelectric energy even if it is comingled with interstate energy.

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[31]The statutes preserved by section 201(b) indicate that the states would have control over rates, in addition to exportation. The New Hampshire statutes made explicit provision for the determination of reasonable rates for hydroelectric energy. P.L. 240:33, as amended by 1929 N.H. Laws ch. 106, and P.L. 240:34. While the Maine statute, Me.Rev.Stat. ch. 68, § 1 (1930), did not make such explicit reference, the Maine Public Utilities Commission had general power over setting rates for electric utilities supplying service within the state. Me.Rev.Stat. ch. 62, §§ 16-35 (1930). The Wisconsin statute, like the New Hampshire statutes, provided for the determination of reasonable rates for hydroelectric energy. Wis.Stat. § 31.27 (1931). In addition, the statute provided that the Wisconsin Public Utilities Commission had the power to declare void any contracts for sale of hydroelectric energy into which the utility may have entered. Finally, section 3*(j)* of the West Virginia statute explicitly empowers the West Virginia Public Service Commission to regulate the rates for hydroelectric energy. 1929 W.Va. Laws ch. 58, § 3 *(j)*.

[32]As discussed above, PURPA specifically made the provisions of sections 210, 211, and 212 applicable to state regulation of exportation of hydroelectric energy. *See* note 19, *supra*.

Conclusion.

For the reasons stated above, the decision of the New Hampshire Supreme Court should be affirmed.

Respectfully submitted,

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Appendix.

NEW HAMPSHIRE LAWS (1913)

Chapter 145

Sect. 17. Said act is further amended by inserting after section 16 a new section as follows:

Sect. 17. No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state unless it shall first file notice of its intention so to do with the public service commission and obtain an order of said commission permitting it to engage in such business. The commission may of its own motion or on application of any person, investigate or make inquiry, in a manner to be determined by it, as to the existence of an available market at fair rates within the state; and if it shall find that such a market does not exist within a reasonable distance of the power development, it may make an order granting such permission and may impose the condition that consumers within the state shall be furnished service by said corporation upon terms as favorable as shall be granted to consumers outside the state, having due regard to all facts and conditions which may affect said subject; *provided, however,* that nothing in this paragraph shall apply to corporations now engaged in the business of transmitting such electrical energy to any place outside the state, but any addition to such energy generated from any water power except such as it may be using in connection with such business at the date of the passage of this act, shall come under the provisions of this paragraph. *Provided, further,* that the provisions of this paragraph shall not apply to the transmitting of electrical energy generated from water powers upon the Connecticut river; nor shall they prevent any railroad corporation doing business in this state from transmitting electrical energy beyond the confines of the state for the purpose of operating its road between some point in this state and any point or points outside the state.

33. Permission Required. No corporation engaged or authorized to engage in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public service commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use. [As amended by 1929 N.H. Laws ch. 106.]

34. Investigations; Orders. The commission may, of its own motion or on application of any person, investigate or make inquiry, in a manner to be determined by it, as to the existence of an available market at fair rates within the state; and, if it shall find that such a market does not exist within a reasonable distance of the power development, it may make an order granting such permission and may impose the condition that consumers within the state shall be furnished service by said corporation upon terms as favorable as shall be granted to consumers outside the state, having due regard to all facts and conditions which may affect the subject; provided, that nothing in this section shall apply to corporations engaged in the business of transmitting such electrical energy to any place outside the state on May 15, 1911; but any addition to such energy generated from any waterpower, except such as it was using in connection with such business on that date, shall come under the provisions of this section; provided, further, that the provisions of this section shall not prevent any railroad corporation doing business in this state from transmitting electrical energy beyond the confines of the

state for the purpose of operating its road between some point in this state and any point outside the state.

NEW HAMPSHIRE REVISED STATUTES ANNOTATED (1966)

Chapter 374

374:35 Permission Required. No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

374:36 Investigations; Orders. The commission may, of its own motion or on application of any person, investigate or make inquiry, in a manner to be determined by it, as to the existence of an available market at fair rates within the state; and, if it shall find that such a market does not exist within a reasonable distance of the power development, it may make an order granting such permission and may impose the condition that consumers within the state shall be furnished service by said corporation upon terms as favorable as shall be granted to consumers outside the state, having due regard to all facts and conditions which may affect the subject; provided, that nothing in this section shall apply to corporations engaged in the business of transmitting such electrical energy to any place outside the state on May 15, 1911; but any addition to such energy generated from

any waterpower, except such as it was using in connection with such business on that date, shall come under the provisions of this section; provided, further, that the provisions of this section shall not prevent any railroad doing business in this state from transmitting electrical energy beyond the confines of the state for the purpose of operating its road between some point in this state and any point outside the state.

REVISED STATUTES OF MAINE (1930)

Chapter 68

Sec. I. Transmission of electric power beyond limits of state, prohibited. R.S.c. 60, § I. [1916]. No corporation, unless expressly authorized so to do by special act of the legislature, shall transmit or convey beyond the confines of the state for the purpose of furnishing power, heat or light, any electric current generated directly or indirectly by any water power in this state; nor sell or furnish, directly or indirectly, to any person, firm or corporation, any electric current so generated to be transmitted or conveyed beyond the confines of the state for any of such purposes. Nothing in this section, however, shall prevent any railroad corporation doing business in this state from transmitting electric current, however generated, beyond the confines of the state for the purpose of operating its road between some point in this state and any point or points beyond its confines; nor shall this section apply to any corporation engaged on the third day of July, nineteen hundred nine, in conveying or transmitting electric current beyond the confines of the state, or chartered or empowered so to do, not affect or impair any contracts then existing for the transmission of electric current beyond the confines of the state.

WEST VIRGINIA ACTS (1929)

Chapter 58

Section 1. This act shall be known and cited as the "Water Power Act." All waters within the state shall be under the control

and supervision of the state. In order to conserve and utilize the energy of the power streams it is hereby declared to be the policy of the state to encourage water power development. It shall be the aim to secure for a given stream or watershed the greatest proper and practicable utilization of the power of such stream or watershed. The control and regulation on the part of the state of the development of water power shall be exercised through the agency of the public service commission of the state of West Virginia under this act. . . .

* * *

Section 3. The commission is hereby authorized and empowered . . . *(j)* To regulate the rates and charges for service to consumers of electricity and other power produced by any licensee hereunder and to regulate accounts of such licensees, all as provided by chapter fifteen-*o* of the code of West Virginia and all acts amendatory thereof. All such rates, charges and tolls for electricity and other power produced by any licensee shall be just and reasonable, and in fixing any rate hereunder the commission shall consider the rate or rates charged by the licensee or its affiliated corporations for power produced hereunder and sold without state.

* * *

[Section 6] *(f)* Under all licenses, excepting those of railroad corporations licensed solely for their own use, the reasonable needs for electric power and energy on part of the state and consumers in this state who can reasonably be served by the licensee shall have preference as compared with the needs of others, and the commission shall have power to enforce this provision by appropriate orders.

WISCONSIN STATUTES (1931)

Chapter 31

Section 31.27. Adequate service; reasonable rates. Upon complaint by any party affected, setting forth that any grantee of a

permit to develop hydraulic power and generate hydroelectric energy for sale or service to the public is not furnishing citizens of this state with adequate service at a reasonable rate in consequence of sales of such energy outside of the state, the commission shall have power to declare any or all contracts entered into by said grantee for such sales null and void in so far as they interfere with such service or rate. Such declaration shall be made only after a hearing and investigation and a recorded finding that convenience and necessity require the sale of a specified part or all such energy within this state.

UNITED STATES STATUTES (1976)

Title 16

§ 813. Power entering into interstate commerce, regulation of rates, charges, etc.

When said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and

charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

* * *

§ 817. Projects not affecting navigable waters; necessity for Federal license.

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

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Nos. 80-1208, 80-1471 and 80-1610.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY, *Appellant*,

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *et al.*, *Appellees*.

COMMONWEALTH OF MASSACHUSETTS, *et al.*, *Appellants*,

v.

NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, *Appellee*,

---

DENNIS J. ROBERTS II, *et al.*, *Appellants*,

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, *et al.*, *Appellees*.

On Appeals From The Supreme Court Of The State Of New Hampshire

---

REPLY BRIEF OF APPELLANT NEW ENGLAND POWER COMPANY

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PARTIES TO THE PROCEEDING BELOW

Pursuant to Rules 28.1 and 34.1(b), Appellant, New England Power Company (NEP) incorporates its statement of "Parties to the Proceeding Below" contained in its Brief at ii (filed July 24, 1981). In addition to the affiliates of NEP there listed, New England Electric Transmission Corporation has recently become an affiliate of NEP.

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On Appeals From The Supreme Court Of The State Of New Hampshire

---

REPLY BRIEF OF APPELLANT NEW ENGLAND POWER COMPANY

ARGUMENT

I. New Hampshire's Prohibition Is Simple Economic Protectionism that Is *Per Se* Invalid

Our initial brief demonstrated that New Hampshire's effort to confine the economic benefits of New England Power Company's

(NEP's) hydroelectric power to New Hampshire residents falls squarely within the Court's decisions holding such economic protectionism to be virtually *per se* unlawful. New Hampshire has attempted to distinguish those decisions by arguing that it has a proprietary interest in the flow of the Connecticut River that entitles it to restrict commerce in the hydroelectric power generated from the flow.

New Hampshire's contention that it possesses a proprietary interest in the flow of the Connecticut River is based largely on a case which has been overruled. *Geer* v. *Connecticut*, 161 U.S. 519 (1896), *overruled by Hughes* v. *Oklahoma*, 441 U.S. 322 (1979). The contention should be rejected. The Court need not reach the issue of proprietary interest, however, because the basic assumption underlying New Hampshire's argument — that a state's ownership of a natural resource would permit it to restrict commerce in products manufactured from that resource by private interests — is wrong. We address this question first.

A. *A Proprietary Interest in a Natural Resource Does Not Entitle a State To Restrict Commerce in Products Manufactured from the Resource by Private Parties*

New Hampshire does not, and could not, deny that the hydroelectric power it seeks to restrain is a product of NEP's investment and manufacture. Nor does it deny that electric power is a product separate and distinct from the flow of a river.[1] New Hampshire does assert, however, without citing any authority, that its "prior rights in the potential energy in the flow of the river" entitle it to restrict commerce in the manufactured commodity. Brief of Appellees at 8-9; *see also id.* at 7.

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[1] Such an argument would be foreclosed in any event by *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932), in which the Court held that, for purposes of the Commerce Clause, there is a distinction between the mechanical energy of falling water and the electric energy produced from it. The Court noted that hydroelectric generation "converts the mechanical energy of falling water into electrical energy" and "by the application of human skill, a distinct product is brought into being," *id.* at 179, much like, for example, "the conversion of wheat into flour at the mill." *Id.* at 180. *Cf. McMillan* v. *Noyes*, 75 N.H. 258, 264-65, 72 A. 759, 762 (1909)(recognition of hydroelectric energy as a "product" whose manufacture was intended to be encouraged by a certain New Hampshire statute).

The decision in *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), refutes New Hampshire's assertion. There the Court held that Alaska's ownership of certain oil and gas resources did not entitle it to require that private parties exploiting the resources favor Alaska residents for employment. The Court ruled that, whatever restrictions a proprietary interest might enable a state to place on resources, Alaska's restrictions on employment had gone too far. *Id.* at 531. The same may be said for New Hampshire's assertion: whatever restrictions a proprietary interest might enable the state to place on a resource like river flow, attempting to restrict commerce in products privately produced from it goes too far.

We submit that the result in *Hicklin* would have been no different had Alaska restricted commerce in fertilizer, petrochemicals or, for that matter, electric energy manufactured or generated by private parties from state-owned gas and oil. The restrictions which *Hicklin* held went too far principally affected employment related to extraction and transmission; the New Hampshire statute goes even further. Unlike New Hampshire's statute, the "Alaska hire" law did not go so far as to restrict commerce in the products manufactured from the state-owned resource, did not restrict the resource from being exported, and had no application once the resource was exported. In contrast, New Hampshire's law does not even regulate the resource that it assertedly owns (the river's flow), but seeks to restrict only a product manufactured from that resource. Thus, New Hampshire's position must rest on the argument that a state may regulate any product derived from state-owned resources without any limitation by the Commerce Clause.

To accept New Hampshire's argument would remove from the protection of the Commerce Clause innumerable products produced by private parties, seriously undermining the concept that "in the matter of interstate commerce we are a single nation." *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 596 (1923). For example, the argument would authorize an export ban on all articles — such as furniture and newsprint — manufactured from timber grown on state land, or on all articles manufactured from aluminum that is produced from bauxite found under state land. [2] The infinitely expansive nature

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[2] *Cf. South-Central Timber Development, Inc.* v. *LeResche*, 511 F. Supp. 139, 142-43 (D. Alaska 1981), *appeal docketed*, No. 81-3053 (9th Cir. Jan.

of New Hampshire's argument is also apparent in the context of this case. A great river like the Connecticut can contribute to the production of much more than electric energy. Should New Hampshire be permitted to prohibit the export of crops that were irrigated, or flour that was milled using the river's flow? Merely to state the question is to answer it.

The point is that even if New Hampshire had a proprietary interest in the river's flow that exempted its actions with respect to that flow from Commerce Clause constraints (which, as we show in Part I.B. *infra*, it does not), it could not bootstrap that interest into a right to restrain commerce in products, such as electric power, into which the river's flow is converted by private investment and enterprise. The electric power manufactured by NEP is a product which NEP owns precisely as the companies owned the natural gas extracted from the ground in *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911), and *Pennsylvania* v. *West Virginia*. New Hampshire's prohibition against the exportation of hydroelectric power is no different, analytically, than a state's prohibition against exporting natural gas that it has allowed to become privately owned. The starting point for analysis here, therefore, is not the state's interest in rivers, but this Court's holding in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), that "[t]he transmission of electric current from one State to another, like that of gas, is interstate commerce." *Id.* at 86.

Because New Hampshire has sought to restrict privately-produced hydroelectric energy and not use of river water itself, its reliance on *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349 (1908), is misplaced. Whatever the vitality of that decision, it is irrelevant to this case.[3]

15, 1981), in which a court held that Alaska's policy of requiring "primary manufacture" of timber in-state as a condition to the sale of state-owned timber violates the Commerce Clause.

[3] The decision in *Hudson County Water Co.*, upholding a state restriction on the diversion of fresh waters from a stream to an out-of-state buyer, rested largely upon *Geer* v. *Connecticut*, 161 U.S. 519 (1896), which, as noted, has been overruled by *Hughes* v. *Oklahoma*, 441 U.S. 322, 326 (1979). The author of the opinion in *Hudson County Water Co.* later dissented in both *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911), and *Pennsylvania* v.

B. *New Hampshire Does Not Have a Proprietary Interest in the Flow of the River; the State's Interest Is No Greater Than Its Interest in Wild Animals*

In Part I.A *supra*, we showed that a state's proprietary interest in a resource would not entitle it to restrict commerce in commodities produced from the resource by private enterprise. In this part we will show that New Hampshire does not even have the proprietary interest that it claims in the flow of the Connecticut River.

New Hampshire's argument, briefly stated, is that it has proprietary interests in the flow of the river that entitle it to condition NEP's use of the flow to generate power. Brief of Appellees at 8-9. As a part of that argument, New Hampshire notes that this Court has frequently rejected the concept of private ownership of a navigable river like the Connecticut. *Id.* at 7-8, *citing United States* v. *Twin City Power Co.*, 350 U.S. 222, 228 (1956), and other cases. From the absence of private ownership, New Hampshire apparently argues that ownership must reside in the state.

This Court's own explanation of the cases cited by New Hampshire shows the fallacy in the state's argument. In *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954), the Court explained that those cases established the "inconceivability of private *ownership in the running water* of navigable streams as distinguished from private proprietary *rights to the use of such water* for power and other purposes." *Id.* at 250 n.14 (emphasis in original). It is only the "proprietary rights to the use of such water for power" that are relevant to this case, because the hydroelectric power at issue is the product of the exercise of those rights and not of any claim to "ownership in the running water." New Hampshire's contention that NEP cannot own the river itself, and the cases cited by New Hampshire to support its contention, are therefore inapposite.

West Virginia, 262 U.S. 553 (1923), in the latter case citing *Hudson County Water Co.* in his dissent, 262 U.S. at 603; *see also Hughes* v. *Oklahoma*, 441 U.S. at 330 n.9. And this Court subsequently summarily affirmed a case reaching the opposite result from *Hudson County Water Co.* on similar facts. *Carr* v. *City of Altus*, 385 U.S. 35 *(mem.) aff'g* 255 F. Supp. 828 (W.D. Tex. 1966).

Under the common law as adopted in New Hampshire it is NEP, not the state, that owns the rights to use the water of the Connecticut River to generate power. The Supreme Court of New Hampshire has described those rights as follows:

> The rights of riparian owners at common law to a beneficial use of the water of the river or stream, passing through or adjacent to their lands, are not open to serious doubt. They are entitled to a reasonable usufruct of the water, or of the power it is capable of developing in consequence of the natural configuration of the bed of the stream opposite their respective lands. If at that place there is such a fall in the flow of the stream that it is capable of being utilized for the development of mechanical power by the erection of a dam and the usual appliances used in connection therewith, the riparian owner has a valuable interest in that natural condition of the stream, which is incident to his ownership of the land, extending ordinarily to the thread of the stream.

Swain v. *Pemigewasset Power Co.*, 76 N.H. 498, 499, 85 A. 288, 289 (1912). The right of a riparian owner like NEP to use the flow of a river to generate power has been recognized by the New Hampshire Supreme Court as a property right, and if that right is invaded by a private party the riparian owner may recover damages. *Lancaster & Jefferson Electric Co.* v. *Jones*, 75 N.H. 172, 181, 71 A. 871, 876 (1909); *see Swain* v. *Pemigewasset Power Co.*, *supra* at 499-502, 85 A. at 289-90.

Not only does NEP own the right to use the flow of the Connecticut River to generate power, the only proprietary right relevant to this case, but New Hampshire has no proprietary right at all in the Connecticut River. The Supreme Court of New Hampshire in this case referred to the river as "owned by the people of the State of New Hampshire" (J.S. App. 3a), and on other occasions that court has referred to the river as belonging to the state "in full and unrestricted title." *St. Regis Paper Co.* v. *New Hampshire Water Resources Board*, 92 N.H. 164, 169, 26 A.2d 832, 837 (1942). But the New Hampshire court has made clear that the "title" to the Connecticut River is held "in trust for the public." *Id.*[4] The crucial distinction

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[4] Under New Hampshire law, riparian rights do not include rights against the state "in the exercise of its due control of the public waters." *St. Regis Paper Co.* v. *New Hampshire Water Resources Board*, 92 N.H. 164, 171,

between a proprietary interest and "title" as a trustee or guardian was explained by Dean Pound:

> [T]he so-called state ownership of *res communes* [e.g., rivers] and *res nullius* [e.g., wild animals] is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*. The state as a corporation does not own a river as it owns the furniture in the state house. It does not own wild game as it owns the cash in the vaults of the treasury. What is meant is that conservation of important social resources requires regulation of the use of *res communes* to eliminate friction and prevent waste, and requires limitation of the times when, places where, and persons by whom *res nullius* may be acquired in order to prevent their extermination.

R. Pound, *An Introduction to the Philosophy of Law* 111 (Yale paperbound ed. 1954); *see FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 246-47 & n.10 (1954); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 744-45 (1950); *Toomer* v. *Witsell*, 334 U.S. 385, 402 (1948). [5]

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26 A.2d 832, 838 (1942). In *St. Regis Paper Co.*, for example, the New Hampshire Supreme Court held that the riparian rights of a paper company were not infringed by a state-constructed dam that made no provision for the passage of the paper company's logs. Thus, New Hampshire's power of regulation of the flow of navigable rivers is similar to the power of the federal government to exercise its "navigable servitude" despite an adverse impact on riparian owners. *See generally Kaiser Aetna* v. *United States*, 444 U.S. 164, 175-77 (1979). But at most that power goes only so far as to permit regulation of the river's flow as, in *St. Regis*, by constructing a dam; it does not encompass regulation of the fruits of the riparian owner's use of the river's flow. New Hampshire has taken no action pursuant to whatever power it may possess to control the river's flow that is inconsistent or interferes with NEP's use of the river for power purposes. In any event, any attempt by New Hampshire directly to interfere with NEP's use of the river's flow needed to effectuate NEP's federal license is barred by the Supremacy Clause. *See Washington Dept. of Game* v. *FPC*, 207 F.2d 391, 396 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954), *construed in Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958); *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152 (1946).

[5] "Running water in a natural stream is not the subject of property, but is a wandering, changing thing without an owner, like the very fish swimming in it, or like wild animals, the air in the atmosphere, and the negative community in general." Weil, *Running Water*, 22 Harv. L. Rev. 190, 213 (1909).

As Dean Pound and the other authorities indicate, the whole ownership theory as applied to rivers and wild animals is simply a legal fiction denoting a state's power to preserve and regulate the exploitation of important natural resources. This "ownership" as a guardian or trustee does not alter traditional Commerce Clause analysis, since

> . . . the Court has recognized that the States' interest in regulating and controlling those things they claim to "own," including wildlife, is by no means absolute. States may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such a hoarding and confinement impedes interstate commerce.

Baldwin v. *Montana Fish and Game Commission*, 436 U.S. 371, 385-86 (1978).

In short, any regulation by New Hampshire of the use of the Connecticut River must be regarded no differently than state regulation of wild animals.[6] As the Court held in the term following *Baldwin*, state regulation of wild animals challenged under the Commerce Clause "should be considered according to the same general rule applied to state regulations of other natural resources." *Hughes* v. *Oklahoma*, 441 U.S. at 335. That "general rule" is the one derived from *West* v. *Kansas Natural Gas Company*, *see Hughes* v. *Oklahoma*, 441 U.S. at 329-30, and under that general rule, as discussed in our initial brief, New Hampshire's prohibition against exportation of the economic benefits of hydroelectric power is *per se* invalid.

C. Reeves, Inc. v. Stake *Is Not Relevant To This Case Because New Hampshire Has Not Invested In The Production Of Hydroelectric Energy*

New Hampshire attempts to analogize its prohibition against exportation of hydroelectric energy to South Dakota's policy of confining sales from a state-owned cement plant to local residents in times of shortage, which was upheld in *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980). In fact, however, New Hampshire's prohibition is one of the

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[6] The analogous legal treatment of rivers and wild animals has been described as "complete, from the days of the Roman law to our own time." Weil, *supra* note 5 at 206.

"state . . . regulatory measures impeding free private trade in the national marketplace" that the Court in *Reeves* noted have always been subject to scrutiny. 447 U.S. at 436-37, *citing Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 807-08 (1976).[7] Were New Hampshire to become a "market participant" by using state revenues to build its own generating plants, there might be some colorable argument under *Reeves* that it could restrict its sale of the electric energy generated at those plants to New Hampshire residents.[8] But New Hampshire has not done that. Instead, without making any investment, New Hampshire has simply exercised its regulatory authority to capture privately generated hydroelectric energy for the benefit of in-state residents.[9] That is precisely the kind of "home embargo" that cannot stand under the Commerce Clause. *See H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 539 (1949), *quoted in Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. at 808.

New Hampshire makes an elaborate argument to the effect that because it *could* have built its own generating stations, and asserted-

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[7] Appellees appear to argue that *Reeves'* exemption is applicable because a public utility like NEP is "closely identified with the sovereign." Brief for Appellees at 13-14. But it is established that the actions of an investor-owned public utility are not actions of the sovereign for purposes of constitutional analysis. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350-58 (1974). *Cf. Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976) (public utility not imbued with attributes of the sovereign so as to insulate provision contained in utility's tariff from antitrust laws under state-action exemption).

[8] Such a restriction would still be invalid because its practical effect would be "to hoard the benefits of natural resources [i.e., a river] which by happenstance are found" in New Hampshire. *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 444 (1980).

[9] Indeed, since hydroelectric power was exported for many years before New Hampshire cut off exports, out-of-state ratepayers actually paid off a substantial portion of the investment in NEP's hydroelectric generating stations, thereby reducing rate base and current rates. New Hampshire's belated effort to restrict exports is an attempt to capture for the exclusive benefit of New Hampshire ratepayers economic rents made possible in large part by revenues contributed by out-of-state consumers. (J.A. 12a).

ly, under *Reeves*, withhold the output of such stations from interstate commerce, it should be able to require NEP to withhold the output of NEP's plants. Brief of Appellees at 12-14. The difference between state investment in a manufacturing plant and state regulation of a privately owned manufacturing plant is crucial to *Reeves*, however. Obviously, to withdraw from Commerce Clause scrutiny any state regulation touching commerce in which a state theoretically could invest would destroy that Clause, since theoretically the states could invest in anything.

II. Section 201(b) of the Federal Power Act Is Not an Affirmative Grant of Power to New Hampshire To Regulate Interstate Commerce

New Hampshire concedes that judged solely by its language, Section 201(b) is not an affirmative grant. [10] (In fact, as we argued in our initial brief at 22, the language is inconsistent with an affirmative grant). Nevertheless, it argues that the legislative history of Section 201(b), consisting entirely of the remark made on the floor by Congressman Rogers, evinces a purpose to grant power to New Hampshire to regulate commerce. Brief of Appellees at 16-17, *quoting* 79 Cong. Rec. 10527 (1935). This argument, in turn, rests on either of two contradictory suppositions.

The first is that Congress *believed* that the states had power to restrict the export of hydroelectric energy. Though New Hampshire does not complete its argument, it may be completed as follows: since Congress believed that the states had the constitutional authority to restrict hydroelectric exports, it did not find it necessary to grant that authority to them; nevertheless, if the Court now finds that Congress' belief was incorrect, it should construe the language as a grant of authority to regulate commerce so that the presumed will of Congress would be fulfilled.

The answer to this argument is clear: this the Court will not do. *United States* v. *Public Utilities Commission of California*, 345 U.S.

[10] "Although this language is not that usually used by a legislature when authorizing an act, the history of the enactment of that section demonstrates that Congress intended to clothe New Hampshire with authority over the exportation of hydroelectric energy." Brief of Appellees at 15.

295, 302-304 (1953) (holding Section 20 of the Act, 16 U.S.C. § 813 (1976), which leaves certain wholesale rate regulation to the states, ineffective to permit such regulation in light of *Attleboro's* holding seven years later that such state regulation is void; Congress did not in Section 20 affirmatively grant the regulatory power to the states but simply assumed a breadth of state power that *Attleboro* showed was wrong).

The second supposition, which is diametrically opposed to the first, is that Congress *believed* that the states *lacked power* to impose export restrictions. Therefore, to avoid having Section 201(b) be a meaningless gesture, the Court, it is argued, should strain to find a basis for a grant of power to the states in language that New Hampshire concedes "is not that usually used by a legislature when authorizing an act." Brief of Appellees at 15. New Hampshire argues that it must be presumed that Congress did not intend the words "lawful authority now exercised" to refer to lawfulness; instead, those words mean the presence of state enabling legislation not yet stricken by any court. Under this curious construction, Section 201(b) would not be an affirmative grant of power to regulate commerce to State A, whose enabling legislation had been declared unconstitutional prior to passage of the Act, but that section would be an affirmative grant of power to regulate commerce to State B, whose identical legislation had not been judicially challenged as of the Act's passage.

Aside from New Hampshire's inability to find a persuasive construction of the language of Section 201(b) that is consistent with a grant of authority, its basic argument is circular. Its argument is that though the language does not appear to be a grant, the purpose to make a grant should persuade the Court to disregard the language. But New Hampshire points to nothing in the legislative history that demonstrates this purpose. Instead, it simply assumes that Congress intended for it to have power to regulate commerce and then attempts to make the language fit, not at all well, that assumption. As argued in our initial brief, however, the language of both Section 201(b) and Congressman Rogers' remarks on the floor is inconsistent with a purpose to grant power to the states. Section 201(b) is simply a traditional savings clause, saving from Part II preemption whatever "lawful authority" the states then had exercised over hydroelectric energy exports. See Brief of NEP at 22-29.

III. The PUC's Order Is Preempted by Part I of the Federal Power Act

In our initial brief, we demonstrated that the order of the New Hampshire Public Utilities Commission (PUC) is inconsistent with and preempted by Part I. We pointed out that the PUC's order frustrates the central purpose of Part I: to provide for the maximum development of hydroelectric power for the use and benefit of interstate commerce. By removing the economic benefits of hydroelectric power from interstate commerce, the PUC's order defeats the basic premise of the licenses under which NEP's hydroelectric units operate. [11]

New Hampshire acknowledges that the Act established exclusive federal licensing authority over hydroelectric development on the Connecticut River, but argues that Congress was indifferent to whether the power generated would benefit interstate commerce. Instead, New Hampshire argues that in exercising its power under the Commerce Clause, Congress' concern was limited to improving navigation for the benefit of interstate commerce; with respect to the other aspects of "comprehensive development" of the waterways as to which Congress articulated a federal interest, Congress had no intention to benefit interstate commerce. Brief of Appellees at 29.

New Hampshire's argument is founded entirely on a misreading of Section 10(a), 16 U.S.C. § 803(a) (1976), which provides in relevant part:

> All licenses under this subchapter [Part I] shall be on the following conditions:
>
> That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan [1] for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, [2] for the improvement and utilization of water-power development, [3]

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[11] We also showed how the PUC's order will inhibit future development of New Hampshire's hydroelectric potential, contrary to the purpose of Part I to promote hydroelectric development. Brief of NEP at 35-36. New Hampshire has not answered that argument. Nor does New Hampshire argue that Section 201(b) saves the PUC's order from preemption by Part I. See Brief of NEP at 36-37.

> and for other beneficial public uses, including recreational purposes. . . .

Pointing out that the quoted portion of Section 10(a) contains three clauses describing federal interests, and that only the first speaks of benefitting interstate commerce, New Hampshire argues that Congress intended only that improvement or development of waterways, and not development of power, benefit interstate commerce. In order to make this argument, New Hampshire ascribes to the words "improving or developing a waterway or waterways" the limited meaning of improving navigation, that is, improving the waterway for use as a highway. Brief of Appellees at 29.

New Hampshire's effort to confine the scope of federal interests that could benefit interstate commerce to development of a waterway "as a highway," *i.e.*, to aid navigation, ignores the obvious structure of Section 10(a) and is flatly inconsistent with the legislative history of that Section. The first clause, requiring that the improvement or development of the waterways benefit interstate commerce, obviously is an umbrella clause encompassing all federal interests in river development, while the two succeeding clauses merely illustrate the range of those interests. So understood, Section 10(a), as might be expected, reserves for the use and benefit of interstate commerce all of the fruits of federally licensed river development; Congress did not pick and choose among them as New Hampshire argues.

The legislative history of Section 10(a) confirms this reading. As enacted in 1920, Section 10(a) did not condition licensing on the improvement or development of waterways for the use or benefit of interstate commerce, and the first clause of the relevant sentence in Section 10(a) (quoted above) was concerned solely with improving navigation:

> That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive scheme of improvement and utilization *for the purposes of navigation*, of water-power development, and of other beneficial public uses.[12]

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[12] Federal Water Power Act, ch. 285, § 10(a), 41 Stat. 1068 (1920) (emphasis added). The Federal Water Power Act (FWPA) was recodified, as amended, as Part I of the Federal Power Act, 16 U.S.C. § 792 *et. seq.* by Section 212 of the Public Utility Act of 1935, ch. 687, 49 Stat. 847 (1935).

The Federal Power Commission, charged with implementing the Act, apparently became concerned that the Act did not explicitly condition licensing on development of the waterways to benefit interstate commerce.[13] Responding to this concern, Congress in 1935 clarified its intention by changing the language of Section 10(a) to condition licensing on the improvement of a waterway for the use or benefit of interstate commerce. It did this by changing the first clause to the present "improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce."[14] This history thus makes clear Congress' purpose to benefit interstate commerce and the following statement in that history also makes clear that the term "development of the waterways" may not be equated with improvement of navigation, as New Hampshire argues:

> Section 206 of the bill amends section 10 of the Water Power Act in keeping with the changes made in the preceding amendment.[15] It provides that, as a condition of the issuance of a license, the project shall be such that in the judgment of the Commission, will be best adapted to a comprehensive scheme "for improving or developing a waterway or waterways for the

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[13] *See* H.R. Rep. No. 1318, 74th Cong., 1st Sess., 7, 245 (1935); S. Rep. No. 621, 74th Cong., 1st Sess., 18, 45 (1935).

[14] Public Utility Holding Company Act of 1935: Hearings on S. 1725, Before the Senate Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess. 228, 236 (1935) (hereinafter Hearings).

The above citations are to a comparison of the 1920 Act with the proposed amendments submitted by the FPC and a memorandum explaining the proposed amendments prepared by Mr. De Vane, the Solicitor of the Federal Power Commission who participated in drafting the legislation. The amendments to the FWPA proposed by the FPC were enacted without significant change. See authorities cited note 13, *supra*.

[15] The term "preceding amendment" referred to an amendment to Section 7(a), the municipal preference provision. The amendment to that section struck the word "navigation," to make clear that the Commission's discretion in awarding a preference was not narrowly confined but should encompass the full range of federal interests implicated by development of water resources. Hearings, note 14, *supra*, at 228, 236. Both the amendments to Sections 7(a) and 10(a), moreover, are consistent with the simultaneous

use or benefit of interstate or foreign commerce," *instead of the more limited "for the purposes of navigation."* It also adds to the other beneficial public uses to which the project may be adapted an express provision that the Commission may include consideration of recreational purposes. [16]

This history of the 1935 amendment to Section 10(a) squarely refutes New Hampshire's effort to limit the first clause of the current version to refer to improvements for purposes of navigation. It was precisely to make clear that all aspects of the improvement or development of the waterways by federally licensed projects was to benefit interstate commerce that Congress amended Section 10(a).

IV. As Long as NEP's Hydroelectric Units Are Connected to the Interstate Grid, Any Wholesale Sales by NEP to New Hampshire Utilities Are Subject to FERC's Exclusive Ratemaking Authority

We showed in our initial brief that the Federal Energy Regulatory Commission ("FERC") has exclusive ratemaking authority over all wholesale sales of electric energy in interstate commerce, including wholesale sales within New Hampshire. Since NEP's New Hampshire units would continue, under the PUC's order, to be interconnected to the New England regional power grid, wholesale sales within New Hampshire would necessarily include electric energy transmitted in interstate commerce and would be subject to FERC's exclusive jurisdiction. [17] *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972); *FPC* v. *Southern California Edison Co. ("City of Colton")*, 376 U.S. 205 (1964). See Brief of NEP at 38-45.

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expansion of the Commission's jurisdiction in Section 23(b) to impose mandatory and exclusive federal licensing requirements on all hydroelectric projects that would affect interstate commerce even if located on non-navigable waters. *Id.* at 231, 238.

[16] Hearings, note 14, *supra* at 236 (emphasis added).

[17] New Hampshire's first argument, Brief of Appellees at 30-31, that the PUC's order does not regulate wholesale rates in interstate commerce, is therefore frivolous. NEP's wholesale sales to customers both outside and within New Hampshire are exclusively regulated by FERC.

New Hampshire points out that *if* NEP's hydroelectric units and New Hampshire *were* electrically isolated from the rest of New England, then NEP's wholesale sales within New Hampshire would be wholly intrastate and subject to the PUC's ratemaking jurisdiction. New Hampshire goes on to argue that the imposition by the PUC of a lesser restriction on NEP should not defeat the PUC's jurisdiction. The Court is asked to infer state ratemaking authority from the Section 201(b) savings clause. Brief of Appellees at 30-32.

The short of the matter is that Section 201(b) does not explicitly or implicitly limit FERC's exclusive ratemaking authority over wholesale sales involving electric energy transmitted in interstate commerce. Section 201(b) preserves from Part II preemption only lawful state restrictions on the volume of hydroelectric energy exports; exclusive FERC wholesale ratemaking authority remains intact. The PUC's order invades FERC's exclusive domain and is therefore preempted by Part II of the Federal Power Act. See Brief of NEP at 45-48.

CONCLUSION.

The decision below should be reversed.

Respectfully submitted,

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IN THE

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Appellant,

—v.—

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Appellees.

COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Appellants,

—v.—

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Appellee.

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ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE

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ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI") hereby submits this brief *amicus curiae* in support of the captioned appeal by Appellant New England Power Company ("NEP") from a judgment of the New Hampshire Supreme Court entered on December 23, 1980, upholding the validity of a New Hampshire statute as

applied by the New Hampshire Public Utilities Commission ("PUC") to bar the exportation of hydroelectric energy generated within the state.[1]

INTEREST OF *AMICUS CURIAE*

Edison Electric Institute is the national association of investor-owned electric utility companies in the United States.[2] Its members serve 99.1% of all customers of the investor-owned segment of the utility industry and 77.1% of the nation's electricity users. To serve these customers reliably, EEI's members are interconnected by a complex electrical network linking virtually all electric utilities, whether publicly or investor-owned.

This case concerns several issues of great importance to EEI's members, and to the general public, which is dependent upon reliable supplies of electricity.

First, the decision of the New Hampshire court allows that state to disrupt the comprehensive federal regulatory scheme for regulation of interstate wholesale power transactions. Since electrical facilities in all continental states, except Texas, are interconnected into networks or power pools, interstate power transactions are essential to EEI's members and to all other electric utilities because they ensure reliable and adequate service to all customers.[3] Nationally, there are approximately twenty-five power pooling groups, and all of the New England

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1 All active parties have consented to the filing of this brief *amicus curiae*. Letters from the consenting parties have been filed with the Clerk of this Court.

2 The positions expressed herein are those of EEI members generally. Public Service Company of New Hampshire disassociates itself from the positions expressed herein.

3 *Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 471 (1972) (Douglas, J., dissenting); Federal Power Commission, *The 1970 National Power Survey*, Part 1, Chapter 17 (1970); *see Gainesville Util. Dep't v. Florida Power Corp.*, 402 U.S. 515, 519 (1971).

States are interconnected by a single network.[4] Transactions at wholesale among the interconnected systems are uniformly regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k (1976 & Supp. III 1979). The decision below would empower a state to exploit interests in local energy supplies, and directly or indirectly restrict or bar interstate transactions. These parochial restrictions would disrupt the uniform regulatory system established by the FERC and relied upon by the members of EEI.

Second, the decision below allows an individual state to hoard its indigenous energy resources. The nation's basic energy resources—coal, oil, natural gas, uranium, and water power—are not uniformly distributed. The only energy source indigenous to New England generally, and New Hampshire specifically, is water power; coal, oil, natural gas, and uranium fuels used in New England are imported from other states or abroad. The decision below encourages other states to join New Hampshire in the practice of withholding energy resources so important to reliable energy supplies throughout the nation. Thus, the decision of the New Hampshire court is fundamentally antithetical to the notion of a federal union; it will encourage the very barriers to interstate commerce sought to be prevented by the commerce clause.

Third, the decision below interferes with the much-needed development of this nation's hydroelectric resources. Hydroelectric power is a dependable and renewable energy resource which now provides 11% of the electric generating capacity in the United States.[5] Approximately 28% of this

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4 Federal Energy Regulatory Commission, *1979 Annual Report* 43 (1980); *New England Power Pool Agreement*, Opinion 775 (FPC 1976), *aff'd*, *Municipalities of Groton v. Federal Energy Reg'y Comm'n*, 587 F.2d 1296 (D.C. Cir. 1979).

5 U.S. General Accounting Office, *Hydropower—An Energy Source Whose Time Has Come Again* 6 (January 11, 1980) [hereinafter cited as *GAO Hydropower Report*].

capacity, nationwide, is owned by investor-owned utilities.[6] Congress has long recognized the importance of hydroelectric power and, as a result of recent events, has facilitated the intensive development of hydroelectric power.[7] In the past year, there has been a tremendous surge of interest in developing this resource,[8] and a major effort by the FERC to facilitate that development.[9]

The potential hydroelectric resource is vast, but it is not evenly distributed among the states.[10] If it can be developed, hydroelectric capacity will be a major, and renewable, energy source for EEI's members and their customers. However, the decision below allows a state to create an artificial barrier to the development of this resource at precisely the time when Congress and the FERC have acted to remove barriers to its development.

In short, the decision of the New Hampshire court, if upheld, will encumber access to the nation's energy supplies

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6 *Id.* at 7.

7 The Federal Power Act, 16 U.S.C. §§ 791-824k (1976 & Supp. III 1979), was originally enacted in 1920 to "promote the comprehensive development of the water resources of the Nation . . . ." *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 180 (1946). In 1978, Congress passed the Public Utility Regulatory Policies Act, 92 Stat. 3117 (codified in scattered sections of 15, 16, 30, 42, 43 U.S.C. (Supp. III 1979)), which established incentives to develop hydroelectric resources, 16 U.S.C. § 824a-3 (Supp. III 1979); 16 U.S.C. §§ 2701-08 (Supp. III 1979). In 1980, Congress enacted the Energy Security Act, 94 Stat. 611 (codified in scattered sections of 7, 12, 15, 16, 27, 30, 50 U.S.C.A. (1981)), and increased these incentives in section 408 (codified at 16 U.S.C.A. §§ 2705, 2708 (1981)).

8 During the past year there has been a "dramatic increase" in the number of preliminary permit applications filed with the FERC. U.S. General Accounting Office, *Are Hydropower Licenses and Permits Being Issued Quicker Due to FERC's Streamlined Procedure*? 1 (October 24, 1980); *See* N. Y. Times, July 12, 1981, § 3 (Business), at 6-7.

9 *See, e.g.*, 46 Fed. Reg. 10165, 10166 (February 2, 1981); 46 Fed. Reg. 31902-03 (June 18, 1981).

10 *See GAO Hydropower Report* 9-17; Federal Energy Regulatory Commission, *1979 Annual Report* 56-7 (1980).

and will impair the ability of the nation's electric utilities to function reliably, efficiently, and economically to meet the electrical needs of all customers.

SUMMARY OF ARGUMENT

The decision of the New Hampshire court permitting the state to embargo the exportation of hydroelectric energy generated within the state, should be reversed. First, as applied, the statute upon which the state relies unduly burdens interstate commerce because it prevents the hydroelectric energy generated in New Hampshire from being made available in other states within the interconnected New England electric system. Second, the statute, as applied, is invalid under the supremacy clause because it conflicts with the Federal Power Act, which provides for a comprehensive scheme of federal regulation of sales of electricity at wholesale in interstate commerce and of the operation of federally-licensed hydroelectric projects. Finally, section 201(b) of the Federal Power Act cannot serve as a saving clause for the New Hampshire statute. As this Court has made clear by its earlier decisions involving the Power Act generally and section 201(b) specifically, New Hampshire was not exercising lawful authority when it acted to prohibit hydroelectric power exportation.

ARGUMENT

Acting pursuant to a New Hampshire statute, NH RSA 374:35 (the "New Hampshire statute"), the PUC withdrew permission for NEP "to transmit hydroelectric energy from within the boundaries of the State. . . ." (J.S. App. 40a).[11] The PUC claimed it acted to "regain" for New Hampshire consumers the economic benefit of hydroelectric energy generated within New Hampshire's borders. The PUC rationalized

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11 J.S. App. refers to the appendix to the Jurisdictional Statement in No. 80-1208. J.A. refers to the Joint Appendix in Nos. 80-1208, 80-1471, and 80-1610.

its action by noting that "[t]he public good can be advanced by achieving goals such as providing electric service at the lowest possible cost, and achieving a fair distribution of limited natural resources." (J.S. App. 35a). The New Hampshire court upheld this application of the statute in order "to enable New Hampshire to regain the benefit of its hydroelectric power." (J.S. App. 14a).[12]

This case involves three principles which are firmly established in this Court's jurisprudence. First, this Court has consistently, and as recently as this term, held that state attempts to interfere with interstate commerce violate the commerce clause. *Maryland v. Louisiana*, 49 U.S.L.W. 4562 (May 26, 1981). Second, this Court has regularly rebuffed state attempts to disrupt the uniform federal regulation of both water power and interstate sales of electricity.[13] Third, this Court has rejected arguments that saving clauses in federal statutes authorize continuing jurisdiction under state statutes which burden interstate commerce. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980).

The decision below, upholding the application of the New Hampshire statute, conflicts with all of these established and recently affirmed principles. Therefore, the decision of the New Hampshire court should be reversed.

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12 The northern portion of the Connecticut River forms the boundary between New Hampshire and Vermont. *Vermont v. New Hampshire*, 289 U.S. 593, 619-20 (1933). It is a navigable waterway. *In re Bellows Falls Hydro-Electric Corp. and Connecticut River Power Co.*, 2 F.P.C. 380, 385 (1941). As a navigable interstate boundary, it is difficult to conceive of a river which is more inherently interstate in character. As such a river, it is certainly not a resource which belongs to the State of New Hampshire.

13 *See Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205 (1964); *United States v. Public Utils. Comm'n of Cal.*, 345 U.S. 295 (1953); *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946); and *Public Utils. Comm'n of R.I. v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

A. New Hampshire's Prohibition of the Exportation of Hydroelectric Power Violates the Commerce Clause

The commerce clause of the Constitution grants to Congress the power "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. It has long been settled that the commerce clause is a restriction on permissible state regulation, which "prevents the states from erecting barriers to the free flow of interstate commerce." *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978); *see Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

The commerce clause was drafted "to avoid the tendencies toward economic Balkanization," *Hughes v. Oklahoma*, 441 U.S. at 325, which strained relations between the states under the Articles of Confederation, and which, as this case (and the companion consolidated cases) demonstrates, continue to do so today. *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 532-34 (1949). As this Court noted seventy years ago, the welfare "of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it." *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911). The states "are not separable economic units" and cannot place themselves in " 'a position of economic isolation.' " *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. at 538 (quoting *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935)). This analysis, which is premised on the principle that "our economic unit is the Nation,"[14] is uniquely appropriate to this case, which involves the generation and transmission of electricity, because New Hampshire is not a separable unit electrically or economically.[15]

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14 *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537 (1949).

15 Forty-seven of the forty-eight contiguous states are electrically interconnected, and the interconnection of Texas with neighboring states is the subject of a pending FERC proceeding. *Central Power and Light Co., et al.*, FERC Docket No. EL79-8 (application filed Feb. 9, 1979). New Hampshire itself is part of a single centrally dispatched electrical network serving all of New England. *See New England Power Pool Agreement*, Opinion 775 (FPC 1976).

This Court has established a "virtually *per se* rule of invalidity" against state attempts to effect "simple economic protectionism" by statutes directly burdening interstate trade. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 36 (quoting *Philadelphia v. New Jersey*, 437 U.S. at 624). "The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." 437 U.S. at 624. Moreover, "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *Id.* at 627. Nor may a state confine the benefit of its resources within the state, if its action impedes interstate commerce. *Hughes v. Oklahoma*, 441 U.S. at 335 n. 15.

As applied, the New Hampshire statute offends the very purpose of the commerce clause. It is not a mere impediment, but a total bar to interstate commerce. The New Hampshire statute, as applied, discriminates against interstate commerce: the intended effect of the PUC's application of the statute is to choke off interstate commerce in order to capture an economic benefit for New Hampshire residents. The PUC's rationale for its application of the statute is nothing more than an attempt to isolate New Hampshire from the national economy and to retain the entire benefit of a natural resource within the state.

New Hampshire can neither isolate itself in this manner nor hoard its resources. *Hughes v. Oklahoma*, 441 U.S. at 336-39; *Philadelphia v. New Jersey*, 437 U.S. at 623-25. This overt attempt to block interstate commerce at New Hampshire's borders is "simple economic protectionism." 437 U.S. at 624. As such, it is invalid *per se*.[16]

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16 It is only in cases in which a state statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental" that a statute may be constitutionally valid, if it is narrowly drawn, and if the burden on commerce is justified by the local interest involved. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36-37 (1980). The New Hampshire statute, as applied, cannot meet even the threshhold test. It does not regulate evenhandedly;

(footnote continued on p. 9)

> It does not matter that the State has shut the article of commerce inside the State . . . [or] outside. . . . What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.

437 U.S. at 628. "What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun!" *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. at 539.

The problem of costly and scarce energy supplies affects virtually every state in the nation. This application of the New Hampshire statute is an impermissible solution to that problem. As applied, this statutory provision violates the commerce clause.

B. The New Hampshire Statute, As Applied, Is Invalid under the Supremacy Clause of the Constitution Because it Conflicts with the Comprehensive Scheme of Federal Regulation Established by the Federal Power Act

When it prohibited the exportation by NEP of hydroelectric energy generated within the State of New Hampshire, the PUC intruded upon an area which has long been subject to exclusive control by the federal government. The licensing and development of water power has been controlled by the federal government since 1920, and sales of electricity at wholesale in interstate commerce have been subject to federal authority since 1935. *See* Federal Power Act, Part I, 16 U.S.C. §§ 791-823a (1976 & Supp. III 1979), and Part II, 16 U.S.C. §§ 824-824k (1976 & Supp. III 1979). The exercise of federal authority in this area leaves no room for New Hampshire to prohibit the exportation of hydroelectric energy as it has done in this case. Therefore, because it conflicts with the Federal Power Act, the

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(footnote continued from p. 8)

> rather it overtly discriminates against interstate commerce. Moreover, the local purposes are impermissible however they are described, either as an attempt at economic protectionism, or as an attempt to confer an exclusive right of access to a local natural resource.

New Hampshire statute, as applied, is invalid under the supremacy clause.

The supremacy clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. As this Court stated last term, "It is basic to this constitutional command that all conflicting state provisions be without effect." *Maryland v. Louisiana*, 49 U.S.L.W. at 4568.

It is manifest that the New Hampshire statute, as applied, violates Parts I and II of the Federal Power Act. *Id.*; *see Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Part I of the Federal Power Act requires the licensing of all hydroelectric projects located on navigable waters, and of all such projects on non-navigable waters if "the interests of interstate or foreign commerce would be affected. . . ." Federal Power Act, § 23(b), 16 U.S.C. § 817 (1976). This standard draws upon Congress's "full authority under the Commerce Clause." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 96 (1965). Part I further provides that all licenses issued pursuant to it be on the condition, *inter alia*, that the project "be best adapted to a comprehensive plan . . . for the use or benefit of interstate . . . commerce. . . ." Federal Power Act, § 10(a), 16 U.S.C. § 803(a)(1976). As this Court held thirty-five years ago, Part I was enacted to establish "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation. . . ." *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 180 (1946) ("First Iowa").

"The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." *Id.* at 181. As applied, the New Hampshire statute is unquestionably a conflicting state control. Despite the fact that the NEP hydroelectric projects are licensed on the condition

that they benefit interstate commerce,[17] New Hampshire has prevented the electric output of those projects from entering interstate commerce. In short, as applied, the New Hampshire statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Notwithstanding the obvious conflict between the New Hampshire statute and Part I of the Federal Power Act, the New Hampshire court found that the New Hampshire statute is not preempted because compliance with it is not a condition precedent to securing a federal license and because New Hampshire has not sought to block hydroelectric development on the Connecticut River. (J.S. App. 5a).

This reasoning is fallacious. First, New Hampshire has not sought to block these licenses or impose conditions on their issuance because it has no power to do so. *See First Iowa*, 328 U.S. 152 (1946). Second, regardless of how they are characterized by the New Hampshire court, New Hampshire's actions are tantamount to an attempt to block hydroelectric development on the Connecticut River. The projects were licensed by the federal government on condition that they benefit interstate commerce. New Hampshire has prohibited fulfillment of that condition, thereby interfering both with compliance with the project licenses and with accomplishment of the underlying purpose of the hydroelectric development. From the perspective of the federal interest in interstate commerce, the New Hampshire statute has the same effect as an effort to block development *ab initio*. Neither is permissible. The State concedes that it has no power to condition issuance of the federal license in the first place. It is no more permissible for New Hampshire to obstruct NEP's ability to comply with a valid condition of its federal license. Thus, the New Hampshire statute, as applied, conflicts with Part I of the Federal Power Act and violates the supremacy clause.

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17 *See, e.g., Connecticut River Power Co.*, 11 F.P.C. 751, 754 (1952).

Part II of the Federal Power Act provides for FERC jurisdiction to regulate the interstate transmission and wholesale sales in interstate commerce of electric energy. Federal Power Act, § 201, 16 U.S.C. § 824 (1976 & Supp. III 1979). In 1927, this Court held that the states have no power to regulate sales such as NEP's sales at wholesale. *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) ("Attleboro"). Congress responded by enacting Part II of the Federal Power Act:

> Part II is a direct result of *Attleboro*. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales.

United States v. Public Utilities Commission of California, 345 U.S. 295, 311 (1953). FERC jurisdiction over such sales is plenary.[18] *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 216 (1964) ("*City of Colton*"). Therefore, New Hampshire has no power to regulate wholesale sales of electricity. It cannot directly or indirectly regulate the rates for such sales. *United States v. Public Utilities Commission of California*, 345 U.S. at 311.

Although NEP's sales of hydroelectric energy are clearly and admittedly wholesale sales in interstate commerce, the New Hampshire court found that the PUC's use of the New Hampshire statute to regulate these sales was not preempted by Part II of the Federal Power Act. (J.S. App. 3a). Striving to elude the comprehensive regulatory scheme established by Part II, the New Hampshire court stated: "This is not a control of rates but rather a control of the assignment of the power." (J.S. App. 12a).

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18 The only exception to this plenary grant of jurisdiction is for sales "made explicitly subject to regulation by the States." *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 216 (1964). As discussed at pages 15 to 17 *infra*, no such explicit exception exists in this case.

The New Hampshire court's characterization of the PUC's action as something other than wholesale ratemaking is wholly unconvincing. Indeed, the New Hampshire court was itself apparently unconvinced and could not ignore the reality of the PUC's application of the New Hampshire statute:

> Its [the New Hampshire statute] purpose is to give New Hampshire the benefit of that power of which its residents now get only about six percent.
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> . . .
>
> The PUC concluded that hydroelectric power is cheaper to the extent of approximately $25 million a year. . . . [T]he Public Service Company of New Hampshire's rate per kilowatt hour exceeds [NEP's] rate by about 25 percent. . . . Rates to New Hampshire consumers are higher due to the lack of access to New Hampshire's major hydroelectric stations' output; the dollar savings to New Hampshire consumers, if the power is sold within this state, would be substantial.

(J.S. App. 11a-14a). Despite the prohibition on state regulation of wholesale rates, directly or indirectly, the New Hampshire court set aside its illusory distinction between "assignment" of power and ratemaking and remanded the entire matter for NEP to make appropriate wholesale rate filings to the FERC to implement the New Hampshire statute. (J.S. App. 14a).

New Hampshire's use of its statutory provision to require NEP to file new wholesale rates reflecting a reduced cost base foisted on NEP by state fiat, is a "substantial usurpation" of the FERC's ratemaking authority. *Maryland v. Louisiana*, 49 U.S.L.W. at 4569. It is nothing more than an impermissible attempt to accomplish by indirection what the state is powerless to achieve directly. Thus, the New Hampshire statute, as applied, also conflicts with Part II of the Federal Power Act and violates the supremacy clause of the Constitution.

C. The Saving Clause of the Federal Power Act Does Not Permit New Hampshire to Embargo the Export of Energy to Other States

The New Hampshire court virtually conceded that, standing alone, the New Hampshire statute, as applied, would violate both the supremacy clause and the commerce clause of the United States Constitution. (J.S. App. 5a, 10a-11a). However, the New Hampshire court concluded that a limited saving clause contained in section 201(b) of Part II of the Federal Power Act recognized the New Hampshire statute as "valid and lawful" and was "specifically intended" to allow New Hampshire "to interdict" the flow in interstate commerce of electricity generated at NEP's federally licensed hydroelectric plants. (J.S. App. 8a, 10a).

Section 201(b) of the Federal Power Act provides, in relevant part:

> The provisions of this subchapter [Part II] . . . shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.

16 U.S.C. § 824(b) (Supp. III 1979). This language was inserted at the request of a New Hampshire congressman concerned lest New Hampshire lose its then existing rights over the exportation of hydroelectric energy "produced up there in the granite hills of old New Hampshire." 79 CONG. REC. 10527 (1935). However, nothing in section 201(b) or elsewhere in the Federal Power Act permits the degree of interference with interstate commerce and with administration of the Federal Power Act which the New Hampshire court has condoned in this case.

In a recent decision, this Court interpreted a saving clause strikingly similar to section 201(b) and explicitly rejected arguments that the burdensome effects of a state statute on interstate commerce were authorized by that saving clause. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 49.

This Court held that although the saving clause, section 7 of the Bank Holding Company Act of 1956,[19]

> does reserve to the States a general power to enact regulations applicable to bank holding companies . . . nothing in its language or legislative history . . . support[s] the contention that it also was intended to extend to the States new powers to regulate banking that they would not have possessed absent the federal legislation. Rather, it appears that Congress' concern was to define the extent of the federal legislation's preemptive effect on state law. . . . We therefore conclude that § 7 applies only to state legislation that operates within the boundaries marked by the Commerce Clause.

Lewis v. BT Investment Managers, Inc., 447 U.S. at 48-49. This reasoning, which invokes both the supremacy clause and the commerce clause, is directly applicable to the instant case. By parallel reasoning, the New Hampshire statute, as applied, clearly violates both constitutional provisions, and New Hampshire's attempt to carve out exceptions to the Federal Power Act cannot be supported by the limited saving provisions of section 201(b).

In 1935, when Part II, which includes section 201(b), was enacted, the jurisdiction of the Federal Power Commission ("FPC", now the Federal Energy Regulatory Commission) was not completely defined. Since then, this Court has explored in several cases the scope of federal jurisdiction under the Federal Power Act. In those cases, this Court has consistently rejected

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19 Section 7 provides:

> The enactment by the Congress of this chapter [the Bank Holding Company Act of 1956] shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has *or may hereafter have* with respect to banks, bank holding companies, and subsidiaries thereof.

12 U.S.C. § 1846 (1976) (emphasis added). In contrast to section 7 of the Bank Holding Company Act, section 201(b) of the Federal Power Act limited the state's powers to "lawful authority *now* exercised."

state attempts to carve out exceptions to federal authority under Parts I and II of the Federal Power Act.

In the 1946 *First Iowa* case, this Court held that section 9(b) of the Power Act, 16 U.S.C. § 802(b) (1976), which refers to compliance with state laws, does not allow the states to impose conditions on the issuance of licenses under Part I of the Act.[20] 328 U.S. at 181. In 1953, this Court refused to allow California to rely upon the saving clauses in section 20 of Part I, 16 U.S.C. § 813 (1976), and section 201(a) of Part II, 16 U.S.C. § 824(a) (1976), to regulate rates in interstate commerce. *United States v. Public Utilities Commission of California*, 345 U.S. at 304-06, 309-11. Significantly this Court there noted that section 201(b) "certainly does not go beyond . . . § 201(a) . . . in limiting federal authority." 345 U.S. at 300 n. 4. Finally, in 1964 this Court rejected California's argument that section 201(b) allows state regulation of wholesale rates in interstate commerce and stated that

> Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

City of Colton, 376 U.S. at 215-16.

Section 201(b) did not create an exception to the detailed and pervasive scheme articulated by the Federal Power Act and elaborated by the decisions of this Court. Unlike other saving

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20 The Court further noted that Part I leaves to the states their "traditional jurisdiction" subject to Congress's superior authority to control interstate commerce. 328 U.S. at 171. The Court noted that section 27 of the Power Act, 16 U.S.C. § 821 (1976), which expressly saves state water laws from preemption, is "especially significant" in this regard. In the context of this case, section 27 is especially significant because its saving provisions are in no way qualified as are those in section 201(b). *See* text at 16-17.

provisions contained in the Federal Power Act,[21] Congress qualified section 201(b) in two respects by limiting its reach to "lawful authority now exercised." First, by requiring that the state authority be "lawful", Congress ultimately relied upon this Court to determine what was permissible under the supremacy clause and the commerce clause. *c.f. United States v. Public Utilities Commission of California.*, 345 U.S. at 303. Second, by referring to "authority now exercised," Congress focused on the regulatory and factual setting existing in 1935.

Turning first to the lawfulness of New Hampshire's attempt to regulate, section 201(b) does not authorize the PUC's application of the New Hampshire statute to prevent NEP from exporting energy generated at its federally-licensed hydroelectric projects on the Connecticut River. First, by its terms, section 201(b) applies only to Part II of the Power Act. Therefore, it does not permit New Hampshire to interfere, as that state has done here, with NEP's compliance with Part I of the Power Act by imposing state controls conflicting with the conditions in licenses issued under the Power Act. Second, this Court has held that section 201(b) does not authorize state rate regulation. *United States v. Public Utilities Commission of California*, 345 U.S. at 300-01 n.4. Therefore, section 201(b) does not allow New Hampshire to regulate wholesale rates in interstate commerce as it has attempted to do here by controlling the "assignment" of power and by requiring NEP to modify its federally-approved tariffs. In short, section 201(b) does not authorize the instant application of the New Hampshire statute.

The fact that section 201(b) does not authorize the instant application of the New Hampshire statute is a reflection of the major changes which have occurred in the electric industry during the forty-six years since Part II was enacted. *Id.* at 302. In 1935, when it enacted Part II, Congress also amended section 23(b) of Part I to give the FPC jurisdiction over

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21 *See* Section 27 of Part I of the Federal Power Act, 16 U.S.C. § 821 (1976).

hydroelectric projects to be constructed on non-navigable streams if those projects affected interstate commerce. 16 U.S.C. § 817. Therefore, in 1935, Congress contemplated the continued existence of a class of hydroelectric projects which would remain unlicensed because they would be located on non-navigable waters and would not affect interstate commerce. It was regulation over exportation of energy from this category of project alone which section 201(b) could, at that time, have rationally preserved for the states under Part II.

In 1935, only four of NEP's present six projects on the Connecticut River had been constructed. At that time, the portion of the Connecticut River which forms the Vermont-New Hampshire border was not considered to be navigable. *In re Bellows Falls Hydro-Electric Corp. and Connecticut River Power Co.*, 2 F.P.C. 380 (1941). Therefore, when section 201(b) was enacted, it could have applied to state regulation of the export of energy from projects then located on the Connecticut River.

However, the situation has changed drastically since 1935. In 1941, the FPC determined that the Connecticut River was navigable, and required licenses for hydroelectric projects located on the River. *Id.* at 385; *see Connecticut River Power Co.*, 10 F.P.C. 1255, 1257 (1951). Between 1935 and 1956, two new NEP projects were constructed on the Connecticut River. (J.A. 19a). These two projects have a total capacity of 217MW, which is more than half of the generating capacity at issue in this case. (J.A. 21a). By 1952, all hydroelectric projects on the River were licensed.[22] Moreover, in 1965, this Court determined that section 23(b) requires the licensing of hydroelectric projects located on non-navigable streams if electric energy from those projects flows in interstate commerce. *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90 (1965).

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22 *Connecticut River Power Co.*, 11 F.P.C. 751, 754 (1952); *In re Bellows Falls Hydro-Electric Corp.*, 5 F.P.C. 271 (1946); *Connecticut River Power Co. and New England Power Co.*, 4 F.P.C. 670 (1944); *Bellows Falls Hydro-Electric Corp. and Olcott Falls Co.*, 4 F.P.C. 3 (1943); *Bellows Falls Hydro-Electric Corp.*, 3 F.P.C. 699 (1942).

Therefore, as early as 1941, and certainly by 1965, section 201(b) no longer had any possible application to energy exported from projects on the Connecticut River, such as the six NEP projects at issue here.[23]

Moreover, in section 201(b), the clause "lawful authority *now exercised*" limited the State's jurisdiction over hydroelectric power to that being exercised at the time the Federal Power Act was enacted. Even though New Hampshire was *exercising* its jurisdiction over non-navigable waters in 1935, it had applied its statute only to permit, and not to prohibit, export of hydroelectric energy. (J.S. App. 26a-27a). Section 201(b), which arguably saved "authority *now* exercised", cannot serve as a saving clause for the New Hampshire statute as New Hampshire now seeks to apply it—to prohibit export of hydroelectric energy.[24]

With these contractions of the residuum of state jurisdiction, nothing has been left to the states under the Federal Power Act except what has been expressly legislated by Congress. *City of Colton*, 376 U.S. at 216. While the New Hampshire statute might retain some utility in matters of very local concern, section 201(b) cannot save the statute in this case.

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23 To the extent that section 201(b) may have had a broader reach in 1935, this breadth assumed the existence of state powers which later decisions of this Court have shown not to exist. *See United States v. Public Util. Comm'n of Cal.*, 345 U.S. at 304.

24 Since two of these projects did not exist in 1935, section 201(b) could not conceivably apply to them because New Hampshire then exercised no authority over them.

CONCLUSION

For the foregoing reasons, the decision of the New Hampshire Supreme Court should be reversed.

Respectfully submitted,

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Nos. 80-1208, 80-1471 and 80-1610

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

NEW ENGLAND POWER COMPANY,
APPELLANT,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION,
ET AL.,
APPELLEES.

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,
v.
NEW HAMPSHIRE LEGISLATIVE UTILITY
CONSUMERS' COUNCIL,
APPELLEE.

DENNIS J. ROBERTS II, ET AL.,
APPELLANTS,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION,
ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

Brief *Amicus Curiae* of the New England Legal Foundation and the New England Council, Inc.

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Statement of Issues Presented.

1. Does the action of the New Hampshire Public Utilities Commission restricting the economic benefits of hydroelectric power generated in the State exclusively to New Hampshire customers violate the Commerce Clause of the Federal Constitution (Art. I, § 8, cl. 3)?

2. Does the action of the New Hampshire Public Utilities Commission regulating interstate wholesale electricity rates violate the Supremacy Clause of the Federal Constitution (Art. VI, cl. 2)?

3. Is the "savings clause" of the Federal Power Act (Section 201(b)) an affirmative grant of authority from the Congress to New Hampshire permitting the regulation of interstate wholesale electricity rates?

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ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

Brief *Amicus Curiae* of the New England Legal Foundation and the New England Council, Inc.

Interest of Amici Curiae.

New England Legal Foundation (NELF) is a non-profit, tax-exempt corporation organized under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on public interest matters. NELF represents the public interests of citizens in the six New England states in judicial and administrative proceedings which affect their economic rights and opportunities. Policy for NELF is formulated by a Board of Directors consisting of attorneys, businessmen and educators. The Board, through its Legal Review Committee, all members of which are attorneys, evaluates the merits of any contemplated legal action and authorizes such action only where the position of the Foundation has broad support in the general community.

NELF has long been interested in the protection of the economic interests of businesses and individuals. When any individual, any collection of individuals, or any corporate or other legal entity, chooses to engage in lawful economic conduct, it should be protected from restrictions imposed in violation of well-established constitutional principles. NELF has been active in its opposition to such restrictions, most recently filing an *amicus curiae* brief challenging a hiring preference and percentage quota for state and local residents on public works construction projects. *Massachusetts Council of Construction Employers v. Kevin H. White, Mayor of the City of Boston*, Mass. S.J.C., No. 2424 (filed March 20, 1980). Similarly, NELF has represented the citizens, businesses, and municipalities of Connecticut in litigation arguing the inequities of the economic costs resulting from airborne pollutants generated by New York and New Jersey. *New England Legal Foundation v. Douglas M. Costle*, 623 F.2d 936 (2d Cir. 1980) (No. 79-6202).

NELF has also been active in energy related matters, having participated in litigation to determine drilling rights for

oil and gas on Georges Bank, *Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979), and having intervened in an administrative hearing before the Environmental Protection Agency to argue in support of the development of an oil refinery in Eastport, Maine. *In re The Pittston Company, NPDES Permit Application No. ME 0022420.*

The New England Council, Inc. (the Council) is a non-profit association of over 1,200 New England employers seeking to improve the economic conditions of the region by influencing national and regional decisions.

In 1980 the Council successfully opposed the anti-nuclear referendum in Maine; consulted with New England companies on EPA regulations affecting the handling of hazardous and toxic materials; worked to educate coastal communities on the pending Outer Continental Shelf oil and gas exploration projects; fought legislation excessively restricting the development of energy resources in Alaska; and consulted directly with the New England Congressional delegation on the Georges Bank Protection Act, the Nuclear Regulatory Commission Authorization Bill, the Alaska Lands Bill, and coal conversion legislation.

Thus far in 1981, the Council has been involved in the decision of the Federal Energy Regulatory Commission to approve the Tennessee Pipeline Project, is working with a number of public and private sector groups to develop a bipartisan review of the Clean Air Act, and has completed a series of six statewide energy briefings on price and availability of energy supplies.

NELF and the Council contend that the Order of the New Hampshire Public Utilities Commission, as affirmed by the New Hampshire Supreme Court, is a discriminatory economic regulation prohibited by the Commerce Clause of the United States Constitution (Art. I, § 8, cl. 3). They file this brief in support of the Appellants with the consent of all

parties. Copies of Appellants' and Appellees' letters of consent are on file with the Clerk of this Court. The Foundation and the Council adopt Appellants' Statements of Facts and Parties.

Introduction.

New England Power Company (NEP) is a public utility which generates and transmits electricity at wholesale in interstate commerce. Its principal customers are three affiliates[1] which resell the electricity at retail to over one million customers in Massachusetts, Rhode Island and New Hampshire. Sales are also made to a small number of non-affiliated utilities, the majority of which are municipal light departments in Massachusetts. A significant portion of NEP's total generating capacity consists of hydroelectric units on the Connecticut River in New Hampshire.[2] These units are licensed by the Federal Regulatory Commission (FERC), successor to the Federal Power Commission, under Part I of the Federal Power Act, 16 U.S.C. §§ 792, *et seq.*

NEP is also a member of a voluntary electricity pooling group, New England Power Pool (NEPOOL). This entity was created formally in 1971, although predecessor energy co-operatives had existed since the 1950's. NEPOOL consists of 60 utilities in the six New England states, incorporating more than 98% of all the generating capacity in the region and nearly all of the transmission network for the delivery of electricity. Joint App. at 30a. The NEPOOL agreement requires each member to submit its bulk generation and transmission facilities to the control of an integrated central dispatch cen-

[1] Massachusetts Electric Company, Narragansett Electric Company, and Granite State Electric Company.

[2] The generating capacity of NEP's Connecticut River hydroelectric plants is approximately 420 megawatts. A megawatt is the equivalent of one million watts.

ter called NEPEX.[3] This dispatch center coordinates all facilities of member companies to ensure overall system reliability and maximum economies of scale through the best economic mix of the various types of generating facilities. *Id.* at 34a. NEPOOL estimates that in 1979 its central dispatch system saved New England over 44 million dollars compared to the costs of independent generation by each company.

On November 21, 1979, the New Hampshire Public Utilities Commission (PUC) invoked for the first time a 1913 statute, N. H. Rev. Stat. Ann. 374:35, requiring utilities which operate hydroelectric facilities in the State to obtain permission to transmit electricity out-of-state. This invocation took the form of an investigation by the PUC to consider whether it should withdraw permission previously granted NEP to transmit hydroelectric energy generated in New Hampshire to locations in Massachusetts and Rhode Island.

The PUC issued its Report and Order on September 19, 1980, providing that:

> [P]ermission granted New England Power Company (NEPCO) to transmit hydroelectric energy from within the boundaries of the State to outside the State is hereby withdrawn [and] . . . that NEPCO make arrangements to sell the previously exported hydroelectric energy to persons, utilities and municipalities within the State. . . . NEP Juris. St., App. C., at 40a.

Although the direction of the Order appears unequivocal, its effect requires explanation. Despite the express prohibition contained in the Order, the interstate transmission of electricity generated by the water powered turbines owned by NEP and located in New Hampshire will not be physically

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[3] Centralized dispatch means that units are operated regardless of ownership or geography, and the transmission capability of the pool allows power to flow in such a way that the total costs to the pool are minimized. NEP Juris. St. at 4.

interdicted. The staff witness for the PUC testified that such electricity will be applied to the benefit of electric customers in New Hampshire through new sales contracts with in-state utilities. Joint App. at 38a. Similarly, the technical expert for NEP concluded that while it is physically possible to prohibit the export of hydroelectricity, such an action would deprive the State of the advantages of the central economic dispatch system operating in the New England region. *Id.* at 36a.

The NEP hydroelectric facilities, therefore, will not be physically removed from the flow of interstate commerce, but will remain interconnected to the power grid of New England. In practice, once power is transmitted into the NEPOOL grid, it is impossible to identify the source of specific kilowatts. The Order of the PUC, then, can be characterized as compelling only a modification in billing, and thus in rates. The Order utilizes an accounting mechanism to achieve its purpose of resetting rates between NEP and its retail utility customers; it increases rates to utilities in Massachusetts and Rhode Island and lowers rates for utilities in New Hampshire, thus limiting the economic benefits exclusively to in-state suppliers and customers.

These consequences were confirmed by the Opinion of the New Hampshire Supreme Court. NEP Juris. St., App. A. at 1a. After restating the language of the PUC Order the Court abandoned the concept of a physical restriction, conceding that once the power is generated it is immediately mixed into the grid. In order, therefore, to achieve the stated objective of the PUC Order, the Court concludes that NEP must reassign through an accounting procedure all hydropower to customers in New Hampshire. *Id.* at 11a-12a. The Opinion reinforces the fact that what is required is an alteration of wholesale electric contracts and rates, not a prohibition of the physical exportation of power.

NELF and the Council contend that the action of the New Hampshire PUC as approved by the New Hampshire Supreme Court establishes a discriminatory economic preference for New Hampshire electricity customers to the substantial disadvantage of customers in Massachusetts and Rhode Island in derogation of the protections of the Commerce Clause and Supremacy Clause of the United States Constitution. The PUC is effectively setting interstate wholesale electric rates, a function specifically retained by the federal government and delegated by the Congress to the Federal Energy Regulatory Commission in the Federal Power Act.

Argument.

I. The Order of The New Hampshire Public Utilities Commission on its Face Violates the Proscriptions of the Commerce Clause of the Federal Constitution by Creating a System of Economic Protectionism for New Hampshire Electricity Customers.

The instant case appeals for judicial intervention not only to correct a misapplication of the law and the Federal Constitution, but also to blunt what have been appropriately termed the "centrifugal, isolating, or hostile forces of localism," Brown, "The Open Economy: Mr. Justice Frankfurter and the Position of the Judiciary," 67 Yale L.J. 219, 220 (1957), and to give proper emphasis to the "centralizing forces of nationhood and union." L. Tribe, *American Constitutional Law* 319 (1978).

The history of this Court's analysis of the Commerce Clause is replete with allusions to the evils of economic isolationism and protectionism. As expressed by Mr. Justice Jackson for the Court in *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949):

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527, "what is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation." In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition. *Id.* at 537-38.

While this Court has been cognizant of the acceptability of incidental burdens on interstate commerce when necessary to assure a state's protection of the public health and safety, it has moved swiftly to condemn cases of simple economic protectionism cloaked in the mantle of health and safety regulation. In fact, the Court has erected a virtual *per se* rule of invalidity against state statutes which restrain or prohibit the free flow of commerce from or into its jurisdiction. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

More specific to the facts of the present case are those instances in which the Commerce Clause has provided the basis for invalidation of state laws arguably designed for conservation of natural resources, but in fact intended to place nonresidents at a commercial disadvantage. In a case uniquely similar to the instant one, *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), this Court held that a statute of a state which produced natural gas could not be drawn so as to require that resident consumers be given a preferred right of purchase over nonresidents. The Court stated that "[T]he provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the

diversion to local consumers of a large and increasing part of the gas heretofore and now going to consumers in the complainant states, and therefore will work a serious interference with commerce." *Id.* at 597. This Court also held a Louisiana law requiring in-state processing of shrimp caught in state waters to be a violation of the Commerce Clause, declaring that, "Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among States and a state statute that operates directly to burden any of its essential elements is invalid. (citations omitted)" *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928).

The rationale for these cases was set forth in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). While holding invalid a New York statute placing restrictions upon the sale within the state of milk produced in other states, Mr. Justice Cardozo stated the basic principles applicable to instances of economic protectionism:

> "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." [Citations omitted.] . . . We are reminded in the opinion below that a chief occasion of the commerce clauses was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." [Citations omitted.] . . . If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation. *Id.* at 522.

The Court observed further that the inevitable link between economic welfare and health would, if permitted to justify the New York statute, forever enable a state to evade

the limitations of the Commerce Clause under the guise of the legitimate exercise of the police power.

> To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the people of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division. *Id.* at 523.

The evils sought to be remedied by the Commerce Clause principles articulated by Justice Cardozo in *Baldwin* are precisely those presented by New Hampshire's reliance on a 1913 statute to impose an economic unevenness on electric consumers in Massachusetts and Rhode Island. Effectively, New Hampshire requires as a condition of the free flow of hydroelectricity across its borders that those citizens of her sister states which consume 90% of the hydroelectric power generated by NEP in New Hampshire subsidize substantially lower rates for New Hampshire citizens. Under whatever guise, this scheme is economically motivated and derogates the principles of the Commerce Clause.

Nor is the state action in this case comparable to the activities which this Court held not to provoke Commerce Clause scrutiny in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). In *Alexandria*, the Court rejected a Commerce Clause challenge to a Maryland statute under which the state paid a bounty to scrap processors for the destruction of any vehicle formerly titled in Maryland, and differentiated in the proof of title required of in-state and out-of-state processors. The Court drew a distinction between the state as a regulator of the natural functioning of the interstate market through prohibitions or burdensome restrictions, and the state as a market participant, bidding up prices. 426 U.S. at 806. It con-

cluded that "[N]o trade barrier of the type forbidden by the Commerce Clause . . . impedes their movement [junk automobiles] out of State . . . [T]hey remain in Maryland in response to market prices. . . ." *Id.* at 809-810.

The *Reeves* case involved a South Dakota practice during periods of cement shortages which confined sales of cement from a state-owned plant solely to state residents. The Court, in sustaining the state action, found the *Alexandria* distinction between "market regulator" and "market participant" controlling. Once a state is participating in the market, it may give preference to its own citizens and have much the same freedom as a private business. 447 U.S. at 436. However, state *regulatory* powers are constrained by the Commerce Clause. *Id.* at 437.

In the instant case, the New Hampshire PUC is functioning as a regulator of hydroelectric power rates and restricting the unimpeded transmission of this energy across state lines. The State neither owns nor operates the generating facilities (*Reeves*); nor has it actively entered the market as a purchaser or supplier (*Alexandria*). Its sole function is to restrain commerce by regulatory restrictions in order to ensure an economic advantage for in-state suppliers and consumers of hydroelectric power. This role necessitates Commerce Clause scrutiny.

In recent years, this Court has utilized a three-part inquiry for Commerce Clause analysis:

> (1) whether the challenged statute regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and (3) if so, whether alternative means could promote this local purpose as well without discriminating against interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

See also, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Great Atlantic & Pacific Tea Company v. Cottrell*, 424 U.S. 366 (1976).

Under this standard, the burden of demonstrating discrimination rests on the party challenging the validity of the statute, but " 'When discrimination against commerce [is] demonstrated, the burden falls on the State to justify [its action] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.' " *Hughes v. Oklahoma*, 441 U.S. at 336, quoting *Hunt v. Washington Apple Advertising Comm'n.*, 432 U.S. 333, 353 (1977). Furthermore, when the Court considers the purpose of a challenged statute, it is not bound by "[t]he name, description, or characterization given it by the legislature or the courts of the State," but will determine for itself the practical impact of the law. *Id.* at 336. (citations omitted)

The action of New Hampshire in the instant case is facially discriminatory against interstate commerce. The PUC Order clearly states its objective to discriminate in favor of New Hampshire customers of hydroelectric power. While the Report and Order, NEP Juris. St., App. C., are framed in terms of the public good and preservation of natural resources, both the public good and the State's resources are to be preserved by economic discrimination in wholesale rate-setting and measured by the local economic benefits generated thereby. The effect of the Order is similar—it compels preparation by NEP of new utility contracts which will result in higher prices for out-of-state suppliers and consumers to accomplish New Hampshire's subsidizing objective. While the Order does not "overtly prohibit" the interstate passage of electrons, it clearly does "block the flow of interstate commerce at [the] State's border," *Philadelphia v. New Jersey*, 437 U.S. at 624, by interdicting the transmission of the direct benefits of that commerce for impermissible

reasons of economic protectionism. Where simple economic protectionism is effected by state action, a virtual *per se* rule of invalidity applies. See, e.g., *H. P. Hood & Sons, Inc.*, 366 U.S. at 538-539; *Toomer v. Witsell*, 334 U.S. 385, 403-406 (1948); *Baldwin*, 294 U.S. at 522-523; *Philadelphia*, 437 U.S. at 623-624.

This facial discrimination by itself may be a fatal defect under the test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), regardless of the purported state objective, since it is well established that "the evils of protectionism can reside in legislative means as well as legislative ends." *Philadelphia*, 437 U.S. at 626. At a minimum, such facial discrimination "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma*, 441 U.S. at 337. While the State of New Hampshire asserts "public good" and "conservation" rationales for its regulation, the "scope of legitimate state interests in 'conservation' is narrower" under this strict analysis. "The fiction of state ownership may no longer be used to force those outside the State to bear the full costs of 'conserving' the wild animals within its borders when equally effective nondiscriminatory conservation measures are available." *Id.* The scope of New Hampshire's conservation interests becomes narrower still given the unabashed declaration by the PUC that its objective, through the wholesale rate-setting mechanism required by invocation of N.H. Rev. Stat. Ann. 374:35, is to promote an economic advantage for its consumers over other electric users in the region. New Hampshire should not be heard to claim a proprietary interest in the navigable waters of the Connecticut River, from which hydroelectric energy is extracted by private interstate businesses, in order to justify a ban on exportation of that energy across state borders.

It is precisely this lack of even-handedness in the treatment of extra- and intra-state economic interests that this Court

has so often condemned. See *Lewis v. B. T. Investment Managers*, 447 U.S. 27 (1980); *Commonwealth Edison Co. v. Montana*, __ U.S. __, 49 U.S.L.W. 4957 (July 2, 1981); and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The principle was most recently enunciated by Mr. Justice Marshall in upholding a Montana tax on coal. In evaluating the state action under the test in *Complete Auto Transit*, the Court asserted:

> [T]he Montana tax is computed at the same rate regardless of the final destination of the coal, and there is no suggestion here that the tax is administered in a manner that departs from this even-handed formula. We are not, therefore, confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other "discrimination" cases. [citations omitted] *Commonwealth Edison v. Montana*, 49 U.S.L.W. at 4959.

Finally, far from choosing a less restrictive regulatory alternative, New Hampshire has chosen to protect its purported 'conservation' interests in a manner which most severely discriminates against interstate commerce. It has banned the exportation of the economic benefits of hydroelectric energy, thus compelling consumers in Massachusetts and Rhode Island to bear a heavier burden of costs. While the State of New Hampshire eloquently narrates the facts of an expanding economy, increased population, and inadequate mix of energy resources, NEP Juris. St., App. C, its action contravenes the most effective manner of providing its citizens with a manageable and sufficient energy supply—namely, equal participation in NEPOOL. The act of denying hydroelectric benefits to other customers in the region is the parochialism which the framers of the Federal Constitution anticipated in the Commerce Clause. *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911). Surely the action of New

Hampshire cannot stand when juxtaposed against Mr. Justice Jackson's concluding statement in *H. P. Hood & Sons, Inc.*:

> Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. 336 U.S. at 539.

II. The Order of the New Hampshire Public Utilities Commission Violates the Supremacy Clause of the Federal Constitution.

None of the parties seriously contests that in the absence of a valid Congressional authorization the New Hampshire PUC Order violates the Constitutional strictures against state regulation of interstate commerce. The Order, however, is also in open conflict with both Parts I and II of the Federal Power Act, 16 U.S.C. §§ 792, *et seq.*, and must therefore fail under the Supremacy Clause, Article VI, of the Federal Constitution. This conflict, moreover, serves to underscore the interpretation that § 201(b) of the Act is not an affirmative grant of authority, but rather a savings clause which delineates the preemptive effect of the federal statute. See Argument III, infra.

Preemption analysis begins with the assumption that traditional state police power is not to be superseded unless such was the clear and manifest intent of the Congress. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). It is the exercise of police power by the states which warrants the deference of an assumption of validity and not the exercise of simple

economic protectionism, whatever its guise. However, even assuming *arguendo* that the PUC's declared intention of reserving for its own citizens the economic benefits of NEP's hydroelectricity is within the realm of its historic police powers, the Order yet collides with the principle of federal supremacy.

As this Court noted in *Ray*, Congress may evidence its preemptive intent in any of several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that no room was intended to remain for supplementation by the states. *Pennsylvania R. Co. v. Public Service Comm.*, 250 U.S. 566, 569 (1919). Or the statute may govern an area of activity in which the federal interest is so dominant that it is presumed to preclude state regulation of the same activity. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

Even if Congress has not completely foreclosed the exercise of state authority in a particular field, a state statute regulating the area is void to the extent that it actually conflicts with federal law. This conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . .," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67; *Jones v. Rath Packing Co.*, 430 U.S. at 526, 540-41. State action must be invalidated, therefore, if its effect is to discourage or prohibit conduct that federal action is intended to encourage, *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967), or if it encourages or mandates conduct whose absence would aid in the effectuation of the federal scheme. *Jones v. Rath Packing Co.* The courts look to the scope and pattern of federal legislation in order to determine its preemptive effect. *Ray*, 435 U.S. at 163.

When the veil of the purported 'conservation' interest is pierced in this matter, the Order of the PUC is seen as in truth nothing more than a requirement for the restructuring of the wholesale electric rates of NEP customers. It requires a bookkeeping adjustment whereby the economic benefits of NEP's hydroelectric power are transferred to New Hampshire customers exclusively. Correspondingly, it mandates that the rates of customers in Massachusetts and Rhode Island be raised to reflect the loss of the cheaper hydroelectric component of the NEP rate structure.

The PUC Order, therefore, has two effects: (a) practically, it alters the rates charged to New Hampshire consumers and to NEP consumers in Massachusetts and Rhode Island; and (b) theoretically, it prohibits transmission of electricity intended for interstate commerce. Neither consequence was intended by the Congress to be authorized to the states, and neither survives Commerce or Supremacy Clause scrutiny.

Part I of the Federal Power Act, originally enacted as the Federal Water Power Act of 1920, is more than the mere licensing provision which the court below describes. It was adopted by Congress in large part to "promote the comprehensive development of the water resources of the Nation. . . ." *First Iowa Hydroelectric Corp. v. Federal Power Commission*, 328 U.S. 152, 180 (1946). "The principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 99 (1965); and see legislative history, *id.* at n.13. The Act was intended to serve a national purpose, and it established a comprehensive federal statutory scheme to achieve this end.

The Federal Power Act governs utilities which participate in energy pooling systems such as NEPOOL, *Federal Power Comm'n. v. Florida Power & Light Co.*, 404 U.S. 453 (1972),

reh. den., 405 U.S. 948 (1972), and where such an interstate pool exists, jurisdiction of the federal statutory scheme is not dependent upon scientifically tracing the actual flow of electricity into the interstate stream. *Arkansas Power & Light Co. v. Federal Power Comm'n.*, 368 F.2d 376 (8th Cir. 1966). The NEP hydroelectric plants whose output is currently at issue are subject to regulation by FERC under the Federal Power Act. NEP Juris. St. at 4-5.

Far from encouraging the development of hydroelectric power to meet the needs of an expanding national economy, the PUC Order is designed solely to restrict the benefits of that power to the New Hampshire economy. Moreover, it will have the inevitable and undesired effect of discouraging hydroelectric development within New Hampshire by any company other than one whose customers are exclusively New Hampshire residents.[4] Such effects create an irresolvable conflict with the purposes and intent of Part I of the Act, and the Supremacy Clause demands that the federal enactment prevail.

The PUC Order is also preempted by Part II of the Act, which was adopted by Congress in the wake of this Court's ruling in *Public Utilities Comm. v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). In *Attleboro* state regulation of interstate wholesale electricity transactions was held to contravene the Commerce Clause. The gap in regulation was thereafter bridged by Congress with Part II of the Federal Power Act, establishing a comprehensive Federal regulatory scheme governing the transmission and sale of wholesale electricity in interstate commerce. The Federal Power Com-

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[4] Such was in fact the unwanted effect of a similar statutory restriction in Maine, and led to the repeal of the Maine statute in 1955. Me. Rev. Stat. title 68 § 1, repealed 1955 Me. Acts c.402, p. 400. And see, Maine Legislative Record, Senate, April 26, 1955, at 1310; House, May 17, 1955, at 2302, 2305, *et seq.*

mission, later succeeded by the Federal Energy Regulatory Commission (FERC), was given authority to regulate the field, except for that portion lawfully within the realm of state regulation. §§ 201(a) and (b), 16 U.S.C. § 824.

When properly viewed as a rate determination for interstate wholesale electricity, the PUC Order quite clearly conflicts with the rate-setting authority vested in FERC and the Congressional guidelines for the exercise of that authority. Congress declared that rates shall be "just and reasonable," shall be determined without "preference or advantage," and shall not create any unreasonable rate differential "as between localities." § 205, 16 U.S.C. § 824(d). Compliance with the PUC Order, however, will require NEP to apply for FERC approval of a new rate structure which will unreasonably deny its non-New Hampshire customers an accepted (historically, as well as by FERC) measure of a just and reasonable rate: the lower operating costs of the hydroelectric portion of NEP generating capacity. The required new rate structure will, moreover, certainly create a preference on the basis of localities, as New Hampshire customers of NEP will enjoy lower rates than those in other states.

The PUC Order, by purporting to regulate the interstate flow of electricity, by in fact regulating its interstate wholesale rate, and by effectively influencing the use of the nation's navigable waterways in the production of hydroelectric energy, creates a severe and irredeemable conflict with the purposes, structure, and methods of the Federal Power Act. It must, as a result, be struck down under the Commerce and Supremacy Clauses of the Federal Constitution.

III. The "Savings Clause" of § 201(b) of the Federal Power Act Does Not Provide an Affirmative Grant of Authority for New Hampshire to Regulate Wholesale Rates of Hydroelectric Power.

In ruling upon the constitutional validity of the PUC Order restricting the flow of economic benefits beyond state bound-

aries, the New Hampshire Supreme Court itself acknowledged that this form of state action would run afoul of traditional Commerce Clause analysis, but for the alleged affirmative grant of authority contained in § 201(b) of the Federal Power Act, 16 U.S.C. § 824(b). NEP Juris. St., App. A., at 10a. Section 201(b) provides, in pertinent part:

> [T]he Provisions of this Part . . . shall not . . . deprive a State or State Commission of its *lawful authority now exercised* over the exportation of hydroelectric energy which is transmitted across a state line. 16 U.S.C. § 824(b) (emphasis supplied).

As this Court articulated in *Lewis v. B. T. Investment Managers*:

> Congress, if it chooses, may exercise this power [regulation of interstate commerce] indirectly by conferring upon the State an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. 447 U.S. at 44, and cases cited.

See also *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

The reading given § 201(b) of the Federal Power Act by the State of New Hampshire, however, is overly broad. Any exception to a clear invocation of Congressional power to regulate a national activity must undergo a restrictive reading. As Mr. Justice Blackmun described in *Lewis*, in commenting upon the effect of a section of the Bank Holding Company Act of 1956[5] offered by the State of Florida to justify its regulation of foreign state holding companies:

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[5] The language of the Bank Holding Company Act interpreted by the Court follows:

> "The enactment . . . shall not be construed as preventing any state from exercising such powers and jurisdiction which it *now or may hereafter* have. . . ." 12 U.S.C. § 1846 (emphasis supplied).

> This section was intended to preserve existing state regulations . . . But we find nothing in its language or legislative history to support the contention that it was also intended to extend to the States new powers to regulate . . . that they would not have possessed absent the federal legislation. Rather, it appears that Congress' concern was to define the extent of the federal legislation's preemptive effect on state law. . . . [O]ne Committee Report stated that it was intended "to preserve to the States those powers which they now have in our dual banking system." . . . Far from creating a new state power to discriminate . . ., the legislative history evinces an intent to forestall such a broad interpretation. 447 U.S. at 48-49.

Despite the expansive language of the provision considered in *Lewis*, (broader, in fact, than that contained in § 201(b)), the Court rejected the State's interpretation. Similarly, § 201(b) can stand only for the limited purpose of preserving and defining those lawful powers which states had in 1935 over hydroelectric energy. On its face § 201(b) saves only the "lawful power now exercised." It does not distinctly and unequivocally grant authority to states to expand their regulatory activities over hydroelectric power; it merely preserves existing authority. *United States v. Public Utilities of California*, 345 U.S. 295 (1953). As the Court noted in the California PUC case,

> The provision [§ 201(b)] certainly does not go beyond that of § 201(a), noted in the opinion, in limiting federal authority. This is true, not only because of the substantial similarity of the language, but also because it appears not to have been drafted with state rate regulation in mind. Rather, 79 Cong. Rec. 10527 indicates that the provision was intended to preserve the validity of certain

> state statutes prohibiting or regulating the volume of state power exported. *Id.* at 300-301 n.4.

Both historical and legislative developments reinforce this conclusion.

In 1920 Congress adopted what is now codified as the Federal Power Act, Part I. 16 U.S.C. §§ 792, *et seq.* This Act, supported by federal authority over the nation's navigable waters, provided for federal licensing of hydroelectric generating projects. Section 20 of the Act specifically limited state authority to set interstate electric rates. 16 U.S.C. § 813. This enactment presaged an increasing role for the federal government in regulating interstate electric rates. It reflected an understanding on the part of Congress that the availability and price of electric power had become a national concern which required some degree of national attention.

Following the 1920 law, this Court in 1927 emphatically declared that state authority to control interstate electric rates and transmission was severely limited. In *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), the Public Utilities Commission of Rhode Island had established a schedule of prices for the sale of electricity in interstate commerce. The effect of this price regulation was to increase electric costs for Massachusetts consumers. The Court, in condemning this interstate discrimination, concluded that "[t]he rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests. . . ." 273 U.S. at 90.

Prior to 1935, therefore, and the enactment of Part II of the Federal Power Act, which contains § 201(b), state regulation of interstate wholesale electric rates did not exist, a fact later confirmed by this Court. In *Public Utilities Commission of California*, a California electric company had sought a rate increase for the power supplied to customers in Nevada. After determining that the transmission of electricity across

state boundaries is clearly interstate commerce, the Court summarily rejected the argument that states have any authority to regulate interstate electricity for resale. "*Attleboro* declared state regulation of interstate transmission of power for resale forbidden as a direct burden on commerce." 345 U.S. at 304.

The boundaries between areas of state and federal concern drawn by *Attleboro* remain unchanged by Part II of the Federal Power Act, and New Hampshire cannot rely upon § 201(b) to overcome what would clearly have been a Commerce Clause violation under the rule of *Attleboro* prior to the enactment of Part II in 1935. The interpretive guidance offered by Mr. Justice Blackmun in *Lewis* teaches that the language "lawful authority now exercised" is nothing more than a savings clause, and may not be read to grant New Hampshire greater authority than it had lawfully exercised prior to the enactment. It would be at best an exceedingly strained reading of Congressional intent to conclude that, at a time when Congress chose to assert greater federal control over the interstate flow of electric power, it would simultaneously expand beyond existing limits the authority of states in the same field, even to the point of permitting state-authorized conflicts with the expressed purposes of the federal scheme. No state in 1935 had authority to set rates or burden the transmission of interstate electric power for resale, and it was not the intention of Congress in § 201(b) to create such authority.

The legislative history of the Federal Power Act, Part II, provides lucid testimony to the meaning of § 201(b). Throughout the extensive legislative debates, which were conducted from May 29 to July 1, 1935, and occupied 414 pages of the *Congressional Record*, there is but one direct reference to § 201(b). That reference is to "certain rights which [states] have over *exportation* of hydroelectric energy. . . ." 79 Cong.

Rec. 10527 (1935) (emphasis supplied). Senator Wheeler of Montana, who managed the legislation in the Senate, placed the sections of the Act into perspective when he said of Title II (dealing with the Federal Power Commission):

> Mr. President, I do not think I shall go into a discussion of Title II of the bill. In the committee there was very little if any discussion with reference to it. It merely amends the present law, and gives the Federal Power Commission the right to regulate the interstate transmission of and wholesale rates for electrical energy and extends control over the waters of this country over which the Congress of the United States has control already. 79 Cong. Rec. 8444 (1935).

Congress was duly mindful of the issues of federalism involved in enactment of the Federal Power Act. It drew lines of authority based on the distinctions judicially set forth in *Attleboro*. As Congressman Lea of California observed, "It is declared that the Federal Government is to have jurisdiction over the regulation of transmission of electricity in interstate commerce, and sales at wholesale in interstate commerce." 79 Cong. Rec. 10377 (1935). Moreover, it was recognized, undoubtedly as a result of *Attleboro*, that "into that unrelated field, where the States have little or no control, . . . the bill, as far as operating concerns are affected, places the Federal Government in control." 79 Cong. Rec. 10377 (1935).[6]

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[6] Review of the debate reveals some Congressional concern over the preservation of state authority. 79 Cong. Rec. 10377. But there was no substantial objection to federal control of interstate wholesale rates and of transmission facilities, since these were not viewed as regulated by the states. This was an accurate view of state regulation at the time in light of *Attleboro*, as later confirmed by *Public Utilities Commission of California*.

The Congressional debates reflect more concern about state or federal jurisdiction of generating facilities than any other subject in this area. In 1935 Congress left such regulation to the states, even though power generated at those facilities may cross state lines.

This analysis of Section 201(b) by no means renders it a Congressional exercise in futility. At the time of enactment, in addition to exportation, regulation of generating facilities, permitting of facilities on non-navigable waterways, or waterways otherwise not subject to the Act, and interstate rates for direct sales to consumers (by the importing state), were viewed as legitimately within the jurisdiction of the states, even though power generated from the facilities entered interstate commerce. See 79 Cong. Rec. 10377 (1935). From this narrow perspective, § 201(b) could be viewed as saving from federal preemptive power state authority over hydroelectric generating facilities and the volume of exportation.

But the action proposed by the State of New Hampshire exceeds this reserved power. For control over the volume of exportation is permissible only to the extent it may be necessary to serve the legitimate purposes of a state under its historic police powers, such as to ensure adequacy of energy supply to its citizens. The "distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud . . ., and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage . . ." *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. at 533, explains the limits of control retained by New Hampshire over the "exportation" of hydroelectric power. To the extent necessary to protect the public health and welfare of its citizens by preserving adequacy of supply,[7] New Hampshire would be permitted under the Commerce Clause, and without limitation by *Attleboro*, to control the volume of exportation of the energy produced by its own waters. Such authority would have been lawfully exercised

[7] It must be recalled that in 1935 pooling arrangements such as NEPOOL, which now ensure to all states adequacy of supply, were not yet in existence.

prior to Part II of the Federal Power Act, and § 201(b) simply preserved it intact. But the Commerce Clause has never permitted an exercise of such authority inhibiting interstate commerce to create a local economic advantage. The New Hampshire PUC proposes to affect interstate commerce directly by reapportioning the economic benefits of the hydroelectricity generated in the State, so that its consumers exclusively receive the advantages through lower wholesale rates. It is apparently of no consequence to the PUC that this conduct increases wholesale rates in Rhode Island and Massachusetts.

This Court has often repeated the admonition that "[t]he states may act . . . only when Congress has specifically granted permission for the exercise of this state power over articles moving interstate which would otherwise be immune." *Public Utilities Commission of California*, 345 U.S. at 304. See also *In Re Rahrer*, 140 U.S. 545 (1891), and *Lewis v. B. T. Investment Managers, Inc.* 447 U.S. at 44 (and cases cited therein). Section 201(b) is no such grant of Congressional power to the State of New Hampshire.

Conclusion.

When the framers of the Federal Constitution undertook to create a common government of the diversified interests of the several states, they well understood that the imposition of economic barriers by one state against its neighbors would quickly spell the end of the union. A proscription against economic parochialism, inherited from the principles of the Fourth of the Articles of Confederation, has therefore become integral to constitutional application intended to prevent such balkanization of interests.

To permit the states to determine whether the flow of commerce may be halted at its borders in order to provide for the

economic advantage of its own citizens would threaten the national solidarity by provoking retaliation. Should New Hampshire, in order to improve the economic standing of its electricity consumers, be permitted to do so at the expense of the citizens of Massachusetts and Rhode Island, then the justification is created for Massachusetts in turn to limit the construction of new utilities, on grounds perhaps of their costs to public health or the environment, to only those necessary to serve the needs of its own citizens. Or Rhode Island, presuming it a net exporter of electricity, may determine that the more expensive oil-generated electricity produced in-state may not be sold to local utilities, thereby exercising only its rightful authority over a purely intra-state matter. To allow a state to so favor its own would be to encourage such divisive retaliation by its neighbors, and thereby to undermine the unity of purpose which is not only central to the regional energy solution provided by the concept of energy pools, but is also present in every fiber of our national cloak of government.

To ensure an adequate energy supply at the lowest economic and environmental costs is a concern not of local or statewide, but of national proportion. To permit New Hampshire simply to export to Massachusetts and Rhode Island its share of a national burden runs directly counter to the basic tenets of our federal union.

For the reasons stated above, the *amicus* parties submit that the decision of the Supreme Court of New Hampshire should be reversed.

Respectfully submitted,

By their attorneys,

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Nos. 80-1208,-1471,-1610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NEW ENGLAND POWER COMPANY, *Appellant*
v.
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION, ET AL., *Appellees*

COMMONWEALTH OF MASSACHUSETTS, ET AL., *Appellants*
v.
NEW HAMPSHIRE
LEGISLATIVE UTILITY CONSUMERS' COUNCIL, *Appellees*

DENNIS J. ROBERTS II, ET AL., *Appellants*
v.
NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION, ET AL., *Appellees*

ON APPEALS FROM THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NEW ENGLAND POWER POOL EXECUTIVE COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF OF THE NEW ENGLAND POWER POOL EXECUTIVE COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

The New England Power Pool Executive Committee hereby respectfully moves for leave to file the accompanying brief as amicus curiae in this case. The consents of the appellants in all of the consolidated cases have been filed with the Clerk. The State of New Hampshire and the New Hampshire Public Utilities Commission, appellees, have given a limited consent to the filing of an *amicus curiae* brief by the New England Power Pool Executive Committee. A copy of that limited consent has also been filed.

The New England Power Pool ("NEPOOL") is comprised of 79 private and public electric utilities which serve customers in the six New England states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.[1] Through NEPOOL, the participant utilities[2] have agreed to interconnect and coordinate the operation of their generation and transmission facilities in order to assure conformance to proper standards of electric service reliability and to attain maximum practicable economy in regional electric bulk power supply. Electric utilities participating in NEPOOL own and control substantially all of the bulk electric generation and transmission facilities in the six New England states.

All NEPOOL activities are performed without regard to the boundaries of the New England states. Pursuant to the NEPOOL arrangements, the electric generation units of the participant utilities are centrally dispatched by the pool on the basis of maximum practicable economy, without regard to ownership. Electric energy generated by those units flows freely over the interconnected network of transmission facilities which is owned and operated by the NEPOOL participants in each of the New England states. In addition to

[1] This Motion and the accompanying Brief are filed on behalf of all NEPOOL participant utilities except Public Service Company of New Hampshire ("PSNH"). PSNH has requested the NEPOOL Executive Committee to inform the Court that PSNH is not joining in the Motion or Brief.

[2] The NEPOOL participants, including the Appellant New England Power Company, are listed in Exhibit A of this Motion and Brief.

coordinated operation, the NEPOOL arrangements provide for joint reliability review and planning of the bulk electric generating and transmission facilities necessary to meet customer needs throughout the region. NEPOOL is generally considered to be the most comprehensive electric power pooling arrangement in the United States. Economic Regulatory Administration, U.S. Dept. of Energy, *Power Pooling: Issues and Approaches* 1.23 (1980).

The New Hampshire statute and the order of the New Hampshire Public Utilities Commission ("PUC") at issue in this case will interfere with the operation of this interstate power pool. NEPOOL is more familiar with this aspect of the challenged order's effect on interstate commerce than are the parties. NEPOOL can therefore add to this Court's appreciation of the burden on interstate commerce created by the PUC's action.

NEPOOL is also able to contribute to the Court's consideration of the federal statutory preemption issues raised on the appeals. A part of the federal laws in question deals with regional pooling of electricity through pools operating as NEPOOL does in New England. That portion of the law is particularly well known to NEPOOL, which is also particularly sensitive to the interference with the purposes and objectives of the federal law which the New Hampshire order has created.

The NEPOOL Executive Committee therefore urges that it be granted leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

July, 1981

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INTEREST OF THE AMICUS CURIAE

The interest of the New England Power Pool ("NEPOOL") Executive Committee in this case is set forth in the accompanying Motion by the NEPOOL Executive Committee for leave to file a brief as *amicus curiae*.

SUMMARY OF ARGUMENT

The basic question in this appeal is the validity of New Hampshire's hydroelectricity export statute, N.H. R.S.A. 374:35, and of an order of the New Hampshire Public Utilities Commission ("PUC") issued pursuant to that statute. Taken together, the statute and order could substantially impede the multi-state cooperative effort of NEPOOL to assure the reliability of electric service and to minimize the cost of electricity in all of the New England states. The statute and order also undermine the federal regulatory scheme pursuant to which electric pooling operations are conducted in the six-state New England region.

The adverse impact of the New Hampshire statute and order on the interstate activities of NEPOOL, combined with the order's purpose and effect of securing the benefit of New Hampshire's water resources solely for New Hampshire residents and the order's apparent retaliatory motivation, constitute a burden and threat to the free flow of interstate commerce. Congress has not authorized New Hampshire's action and the Commerce Clause does not permit a State to act in such a manner.

The New Hampshire statute and order also interfere with the accomplishment of Congress' objectives in enacting Parts I and II of the Federal Power Act. No provision of the Federal Power Act or of any other federal statute authorizes such interference by New Hampshire. Accordingly, Section 374:35 of the New Hampshire Revised Statutes Annotated, as applied, is preempted by federal law.

ARGUMENT

I. Section 374:35 of the New Hampshire Revised Statutes Annotated, As Applied, Creates an Impermissible Burden on Interstate Commerce.

A. Section 374:35, As Applied, Burdens Interstate Commerce.

Although the New Hampshire statute appears to contemplate control over the physical movement of electric energy in order to assure its availability for use within that state, the challenged PUC order does not act to restrict the movement of electric energy produced by the Connecticut River hydroelectric plants owned by New England Power Company ("NEP"). The NEPOOL Executive Committee therefore understands that the electric energy from these hydroelectric plants will continue to be generated subject to NEPOOL dispatch and that such energy will be delivered into the regional transmission network controlled by NEPOOL. Based upon this understanding, the NEPOOL Executive Committee at this time has no reason to believe that the central dispatch of generating and transmission facilities by NEPOOL will be affected by the PUC order. Nevertheless, the PUC order does threaten achievement of the pool's goals of assuring a reliable bulk power supply for the New England region while attaining maximum practicable economy.

The NEPOOL arrangements are structured to achieve the pool's objectives through a number of activities in addition to the central dispatch of the region's bulk electric power facilities. Thus, the NEPOOL arrangements provide for sharing of the saving achieved by pool energy interchange transactions, joint participant facility planning, maintenance of minimum generating reserves, joint cooperation in environmental matters, and coordinated construction, operation and maintenance of the electric generation and transmission facilities owned or controlled by the pool participant electric utilities.

The PUC order will discourage coordinated planning and construction of electric generation and transmission facilities on a regional basis. The New England region, although relatively small, is divided into six states, which are served by a large number of relatively small electric utilities. In order to conserve resources and to secure for their customers the economies of large-scale facilities, New England electric utilities have for many years worked together in the joint planning and joint ownership of generating units. For example, electric utilities from each of the six New England states are owners of interests in regionally-sized nuclear generating plants constructed, or under construction, in Maine, Vermont, Connecticut, Massachusetts and New Hampshire.

While the jointly planned and owned facilities in New England to date have typically not included hydroelectric facilities, future large-scale conventional or pumped storage hydroelectric plants are very likely to be approached on a regional basis. Pumped storage generating plants are large hydroelectric projects which are frequently constructed and operated to complement nuclear generating plants. Two of these large-scale hydroelectric facilities already serve the New England region, having been constructed in Massachusetts by NEPOOL participants. If the challenged PUC order is allowed to stand, electric ratepayers in Massachusetts and Rhode Island, who have for many years supported the costs of NEP's hydroelectric plants in New Hampshire through their rate payments, will no longer continue to receive the economic benefits of lower cost electric energy produced by these plants. It is obvious that New Hampshire's action, if it is permitted to stand, will effectively inhibit NEPOOL participant electric utilities in any other state from participating in future conventional hydroelectric or pumped storage facilities located in New Hampshire.

The New Hampshire order is also likely to affect adversely the joint planning and construction of major facilities other than hydroelectric plants. If allowed to stand, New Hampshire's action will act as an incentive to the

other New England states to secure exclusive benefits for their citizens from the location of generation and transmission facilities in those states. State utility regulatory bodies will be unwilling to permit electric utilities subject to their jurisdiction to invest in the ownership of generating plants in another state when there is any risk that the output of such plants may be required to be sold to customers in the other state and therefore be of no benefit to the retail ratepayers of the owner utility.

The challenged PUC order will also interfere with the NEPOOL arrangements in areas other than regional planning. The pool arrangements assume that the generating facilities of each participant will be first utilized to serve the electric needs of that utility's customers. Any surplus capacity is then available to be shared by the other pool participants. For example, the electric energy produced by NEP's Connecticut River hydroelectric plants is presently considered to be first used to meet the electric service requirements of NEP's customers. Thus, the PUC order effectively destroys a basic premise of pool economics.

The adverse effect of the order on NEPOOL economic arrangements encompasses reserve obligations as well as energy transactions. If NEP is required to sell the electric output of its Connecticut River hydroelectric plants within New Hampshire, the capacity of those generating plants will no longer be considered to be available to meet the capacity requirements of customers which NEP is obligated to serve in Massachusetts and Rhode Island. NEP's responsibility to have specific amounts of electric generating capacity will not be changed, but the capacity available to meet its NEPOOL obligations will be reduced by approximately 420 megawatts. Therefore, NEP's capacity planning within the NEPOOL framework will be jeopardized.

In addition to interfering with the operation of specific pool arrangements, New Hampshire's challenged action imperils NEPOOL by threatening the cooperative spirit which has been essential to the formulation and operation of a comprehensive regional pool. The NEPOOL arrangements

are the result of an extraordinary consensus among the electric systems throughout the six New England states (large and small, rural and urban, publicly-owned and privately-owned). These utilities recognized that through cooperative efforts they could secure their common primary goals of more reliable and less expensive electric service for their customers throughout the six-state region. NEPOOL also owes its existence and successful operation to the cooperative efforts of the governmental authorities of each of the six New England states.

The challenged PUC order imperils the environment of state cooperation which is needed to support NEPOOL. The utilities participating in NEPOOL are each owned by subdivisions of the states or have the conduct of their electric businesses dependent upon state grants of authority and favorable state regulation. If the PUC order is allowed to stand, other states will almost certainly consider efforts to secure comparable short-term economic benefits for their citizens. As each of the New England states seeks to engage in a competitive effort to secure economic advantage or redress, the cooperative foundation of NEPOOL's delicately balanced structure of interconnection and coordination arrangements may well be destroyed.

B. The Discriminatory Burden Imposed on Interstate Commerce By Section 374:35 Is Not Incidental to the Accomplishment Of Permissible State Goals, Nor Is It Authorized By Congress.

The deleterious impact of the New Hampshire order on the interstate activities of NEPOOL would be permissible only if that impact were incidental to a nondiscriminatory effort to achieve a permissible state goal. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Section 374:35, as applied by the PUC, does not satisfy that test.

The PUC's order is discriminatory on its face because it is directed solely against interstate commerce. Although it is conceivable that a prohibition on the interstate sale of

electricity generated by water power might be justified in certain narrowly defined circumstances,[1] New Hampshire has not relied on such circumstances to justify its action. New Hampshire has acted, in the words of the New Hampshire Supreme Court, "to regain the [economic] benefit of its hydroelectric power." J.S. App. 14; see *id.* at 11a.[2] The intent to retain for New Hampshire's citizens the economic benefits of natural resources that happen to be located in New Hampshire cannot justify the state's action; rather, this purpose requires that New Hampshire's action be held invalid in order to avoid the "economic balkanization" that the Commerce Clause was intended to prevent.[3] *E.g., Hughes v. Oklahoma, supra,* 441 U.S. at 325-26. "[A] State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located with-

[1] Such circumstances might arise, for example, if a prolonged drought reduced the availability of water to generate power and threatened the public health and safety of the citizens of New Hampshire. The use of an export limitation in an emergency of that sort may have been what Congress was contemplating when it preserved state laws regulating the exportation of hydroelectric energy in §201(b) of the Federal Power Act, 16 U.S.C. §824(b). As this Court has noted, §201(b) "was intended to preserve the validity of certain state statutes prohibiting or regulating the volume of state power exported." *United States v. Public Utilities Commission,* 345 U.S. 295, 301 n.4 (1953). Of course, since §201(b) was enacted, interstate networks such as NEPOOL have been developed to provide backup capacity in case of a shortfall created by an emergency situation. Since the NEPOOL network would be available to assist in the circumstances posited above, there would be no need for New Hampshire to discriminate against interstate commerce in order to achieve its legitimate public health and conservation purposes. *See Hughes v. Oklahoma, supra,* 441 U.S. at 337-38.

[2] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 80-1208.

[3] The PUC's opinion indicates that another reason for the PUC's order was to retaliate for actions taken by Massachusetts officials in proceedings in Massachusetts. J.S. App. 37a-38a. A State's use of interstate commerce as a hostage in an effort to control the actions of officials of a sister State challenges the fundamental structure of the Federal system.

in its borders." *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).

New Hampshire has not attempted to justify its actions under the principles established by this Court's applications of the Commerce Clause. Instead, it has contended that those principles do not apply because Congress has given it free reign. This contention is based on Section 201(b) of the Federal Power Act, 16 U.S.C. §824(b), which provides that Part II of the Act "shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted over a State line." New Hampshire argues that since this provision was inserted in the Federal Power Act at the behest of New Hampshire representatives who were mindful of the existence of Section 374:35, it must be read as a congressional authorization for regulation under Section 374:35.[4] According to New Hampshire, any other reading of Section 201(b) renders that provision meaningless because the conflict between Section 374:35 and the Commerce Clause was apparent when Section 201(b) was passed. Motion to Dismiss or Affirm in No. 80-1208 ("Motion to Dismiss") at 10-18.

This Court has recently rejected a similar effort to read a statutory savings clause as a congressional affirmation of the existence of the remedy being saved. In *Milwaukee v. Illinois*, 101 S. Ct. 1784 (1981), the Court considered whether Subsection 505(e) of the Federal Water Pollution Control Act ("FWPCA"), which preserves statutory or common law remedies from preemption by the FWPCA,[5] indicated that Illinois' remedies under the federal common law of nuisance survived the passage of the

[4] Even if New Hampshire were correct that Section 201(b) intended to confer on that State regulatory authority that it would otherwise not have under the Commerce Clause, that conclusion would not justify the application of Section 374:35 at issue in this case. See note 1 *supra*.

[5] Subsection 505(e) provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law

FWPCA Amendments of 1972. This Court held that Subsection 505(e) did not signify a congressional determination that such common law remedies existed. As the Court stated, "There is nothing unusual about Congress enacting a particular provision and taking care that this enactment by itself not disturb other remedies, *without considering whether the rest of the Act does so or what other remedies may be available.*" 101 S. Ct. at 1798 n.22 (emphasis added).

The legislative history of Section 201(b) shows that it was enacted "without considering" whether New Hampshire then had any "lawful authority over the exportation of hydroelectric energy." Like Subsection 505(e), Section 201(b) merely reflects Congress' concern that the statutory provisions to which the savings clause was added not have a broader impact than Congress intended. *Cf. Lewis v. BT Investment Managers*, 100 S. Ct. 2009, 2022 (1980) (savings clause in Bank Holding Company Act intended "to define the extent of the federal legislation's preemptive effect on State law.") The legislative history contains no hint that Congress intended to confer on New Hampshire the power to act, as it has, in a manner that threatens the fundamental structural principles on which the Federal Union is based.

II. Section 374:35, As Applied by the PUC, Conflicts With Parts I and II of the Federal Power Act.

The two Parts of the Federal Power Act, 16 U.S.C. §§802-824k, are concerned with two different aspects of the generation and sale of electric energy. Part I authorizes the Federal Energy Regulatory Commission ("FERC") to license hydroelectric plants. It was enacted to "promote the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the Federal power to do so . . . ." *First Iowa Hydro-Electric Coop. v. Federal Power Commission*, 328 U.S. 152, 180 (1946). "The principal use to be developed and regulated in the Act . . . was that of hydroelectric power to meet the needs of an ex-

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to seek enforcement of any effluent standard or limitations or to seek any other relief (including relief against the Administrator or a State agency).

panding economy." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 99 (1965). The federal licensing authority under Part I is exclusive. *First Iowa Hydro-Electric Coop. v. Federal Power Commission, supra*, 328 U.S. at 181.

Part II of the Act was passed to fill the regulatory gap created by this Court's holding in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), that the Commerce Clause precluded state regulation of wholesale interstate sales of electricity. Under Part II, FERC exclusively regulates such sales. FERC is also charged by Part II with encouraging and promoting the development of regional power pools such as NEPOOL. 16 U.S.C § 824a.

Section 374:35, as applied by the PUC, is preempted by both Parts I and II because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The licensing power conferred by Part I is to be exercised only when FERC finds that a project "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes." 16 U.S.C. §803(a). By reserving the economic benefit of power generated by New England Power Company's licensed hydroelectric plants for residents of New Hampshire, New Hampshire has prevented those plants from benefiting interstate commerce, the purpose for which they were federally licensed.[6]

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[6] New Hampshire has argued that there is no conflict between its action and Part I because "the reference to interstate and foreign commerce [in §803(a)] is to the use of the waterway as a highway . . ." Motion to Affirm at 8. Curiously, New Hampshire has cited *Federal Power Commission v. Union Electric Co., supra*, in support of its position. The holding of that case was that "the comprehensive development of water power . . . was the central thrust of the Act . . . ." *Id.*, 381 U.S. at 101.

The New Hampshire action creates an equally direct barrier to the accomplishment of the purposes of Part II. Although the New Hampshire Supreme Court stated that the PUC order "is not a control of rates but rather a control of the assignment of the power," J.S. App. 12a, it is obvious that the power generated by the hydroelectric plants cannot be "assigned" other than through the rate structure for wholesale sales. New Hampshire's order directly infringes on the exclusive rate-setting authority of FERC.[7]

Section 374:35, as applied by the PUC, also thwarts Congress' efforts to encourage regional power pooling. As NEPOOL has explained above, the New Hampshire action will have a serious impact on NEPOOL's ability to provide an efficient, coordinated regional electric network. Congress has repeatedly recognized a special national interest in voluntary regional electric pools, such as NEPOOL. These pools are considered by Congress to be the appropriate organizational arrangement for securing the objective of assuring an abundant national supply of electric energy with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. Federal Power Act, Section 202(a), 16 U.S.C. § 824(a); Public Utility Regulatory Policies Act, § 205, 16 U.S.C. § 824a-1.

The NEPOOL arrangements were filed with the Federal Power Commission ("FPC"), predecessor to the Federal Energy Regulatory Commission. NEPOOL was thereafter the subject of an extensive investigation under Part II of the Federal Power Act. *New England Power Pool Agreement*, Opinion Nos. ,775, 775-A (FPC 1976), *aff'd sub nom. Municipalities of Groton v. Federal Energy Regulatory*

The savings clause contained in Section 201(b) is explicitly directed to Part II of the Federal Power Act and can have no bearing on the question of preemption by Part I. See *Milwaukee v. Illinois, supra*, 101 S. Ct. at 1798 n.22.

[7] The savings clause in Section 201(b) of the Federal Power Act does not authorize this interference with FERC's rate-setting power because that clause allows, at most, state control over the volume of power exported. See note 1 *supra*.

Commission, 587 F.2d. 1296 (D.C. Cir. 1978). The FPC expressly determined that the NEPOOL arrangements conform to the mandates of the Federal Power Act and other applicable federal statutes. In particular, the FPC found that the NEPOOL arrangements advance the national policy of promoting and encouraging regional interconnection and coordination of electric facilities for the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. *New England Power Pool Agreement*, Initial Decision, FPC Docket No. E-7690 at 9-11 (1975), *modified on other grounds*, Opinion No. 775 (1976); Federal Power Act, Section 202(a), 16 U.S.C. §824a(a).

New Hampshire's challenged effort to secure for its citizens the exclusive economic benefit of hydro-electric energy generated within that state jeopardizes attainment of those national policies through NEPOOL. The Constitution mandates that attainment of national policies take precedence over a state's effort to hoard for its citizens the exclusive economic benefit of its natural resources.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

July, 1981

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EXHIBIT A

LIST OF NEPOOL PARTICIPANTS

Allied Power and Light Company
Town of Ashburnham Municipal Light Plant
Bangor Hydro-Electric Company
Blackstone Valley Electric Company
Boston Edison Company
Town of Boylston Municipal Light Department
Town of Braintree Electric Light Department
Burlington Electric Light Department
Cambridge Electric Light Company
Canal Electric Company
Central Maine Power Company
Central Vermont Public Service Corporation
City of Chicopee Municipal Lighting Plant
Citizens Utilities Company
Commonwealth Electric Company
The Connecticut Light and Power Company
Connecticut Municipal Electric Energy Cooperative
Town of Danvers Electric Department
Eastern Edison Company
Village of Enosburg Falls
Fitchburg Gas and Electric Light Company
Town of Georgetown Municipal Light Department
Granite State Electric Company
Green Mountain Power Corporation
Town of Groton Electric Light Department
Village of Harwick Electric Department
The Hartford Electric Light Company
Town of Hingham Municipal Lighting Plant
Town of Holden Municipal Lighting Plant
City of Holyoke Gas & Electric Department
Holyoke Power and Electric Company
Holyoke Water Power Company
Hudson Light and Power Department
Town of Hull Municipal Light Department
Village of Hyde Park

Town of Ipswich Municipal Electric Department
Village of Johnson
Town of Littleton Electric Light & Water Department
Village of Ludlow Electric Light Department
Village of Lyndonville
Town of Mansfield Municipal Electric Department
Town of Marblehead Municipal Light Department
Massachusetts Electric Company
Massachusetts Wholesale Electric Company
Town of Middleborough Gas & Light Department
Town of Middleton Municipal Electric Department
Montaup Electric Company
Village of Morrisville Water & Light Department
The Narragansett Electric Company
New England Power Company
Newport Electric Corporation
Town of North Attleborough Electric Department
Village of Northfield
Village of Orleans
Pascoag Fire District
Town of Paxton Municipal Light Department
City of Peabody Municipal Light Plant
Princeton Municipal Light Department
Public Service Company of New Hampshire
Town of Reading Municipal Light Department
Village of Readsboro
Rochester Electric Light & Power Company
Town of Shrewsbury Electric Light Plant
Town of South Hadley Electric Light Department
Town of Sterling Municipal Electric Light Department
Village of Stowe
Village of Swanton
Taunton Municipal Lighting Plant
Town of Templeton Municipal Lighting Plant
The United Illuminating Company
Vermont Electric Co-op, Inc.
Vermont Electric Generation and Transmission Cooperative, Inc.
Vermont Electric Power Company, Inc.

Vermont Marble Company
Town of Wakefield Municipal Light Department
Washington Electric Cooperative, Inc.
Western Massachusetts Electric Company
Town of West Boylston Municipal Lighting Plant
City of Westfield Gas and Electric Light Department

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IN THE

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NO. 80-1208

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Appellant,

v.

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Appellees.

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COMMONWEALTH OF MASSACHUSETTS, *ET AL.*,
Appellants,

v.

NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL,
Appellees.

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BRIEF FOR UNAFFILIATED MASSACHUSETTS MUNICIPAL WHOLESALE CUSTOMERS OF NEW ENGLAND POWER COMPANY AS AMICI CURIAE

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ON APPEALS FROM THE SUPREME COURT OF
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BRIEF FOR UNAFFILIATED MASSACHUSETTS MUNICIPAL WHOLESALE CUSTOMERS OF NEW ENGLAND POWER COMPANY AS AMICI CURIAE

STATEMENT OF INTEREST

The Unaffiliated Massachusetts Municipal Wholesale Customers of New England Power Company ("Customers") comprise twenty-three cities and towns in Massachusetts,[1] each of which operates a small electric system distributing to its consumers electricity purchased wholly or in part from the New England Power Company ("NEPCO"). Customers are also members of a public corporation created under the laws of the Commonwealth of Massachusetts to permit them to proceed toward the acquisition or construction, and operation, of power supply resources needed to meet the power needs of their citizen-customers.

Customers' interest in this proceeding is threefold. As wholesale customers of NEPCO, Customers will be asked to bear a substantial portion of any additional financial burden imposed upon NEPCO by the State of New Hampshire. As active competitors of NEPCO for the least expensive sources of power, Customers depend upon the free market in electric resources available through the New England Power Pool ("NEPOOL")[2] to permit entities to tailor their power supply mix to most economically meet their needs. Finally, as relatively small entities, Customers enjoy the substantial benefits of integration and coordination and economies of scale obtained by the members of NEPOOL. These benefits obtain because NEPOOL is able to secure the maximum efficiency for the New

---

[1]The members of Customers are set forth in Appendix A.

[2]The NEPOOL Agreement has been approved by the Federal Energy Regulatory Commission ("FERC"). *New England Power Pool Agreement*, Opinion Nos. 775, 775-A (FPC 1976), *aff'd sub nom. Municipalities of Groton* v. *Federal Energy Regulatory Commission*, 587 F.2d 1296 (D.C. Cir. 1978).

England region by operating and planning all electrical resources in the region on a unified, regional basis. This permits relatively small entities which could not, by themselves, finance and construct large, efficient units to do so on a joint ownership basis, thus permitting, for example, the Public Service Company of New Hampshire to be the lead participant in the Seabrook Nuclear Unit. Neither the free market in resources nor the benefits of integration and coordination and economies of scale could exist in an environment in which the several States in the region dealt directly, as in the case below, or indirectly to Balkanize the region by retaining the economic benefits of the electrical generation within that State for its own citizens. The Customers believe that the Order of the New Hampshire Public Utilities Commission ("Commission" or "PUC") strikes at the very heart of our interests.

SUMMARY OF ARGUMENT

The action of the New Hampshire Public Utilities Commission is contrary to the Constitution of the United States because it erects a direct and impermissible barrier to interstate commerce. The domestic needs adduced by New Hampshire are ineffective support for that State's attempt to appropriate a national resource to its local benefit. The law is clear that, no matter how legitimate the local interest, New Hampshire may not advance that interest by erecting barriers to interstate commerce.

The court below mistakenly relied upon Section 201(b) of the Federal Power Act, 16 U.S.C. 824(b), as an affirmative grant of authority by Congress to New Hampshire to regulate or obstruct interstate commerce. The language and legislative history of Section 201(b) belie this interpretation and make clear that Congress

intended merely to preserve for the States whatever lawful authority may have existed in 1935. In 1935 it was quite apparent that the States were without legitimate authority to regulate, *a fortiori* prohibit, interstate commerce in electrical energy.

New Hampshire is disabled from regulating the exportation of hydroelectric energy generated within its borders by Part I of the Federal Power Act, 16 U.S.C. 792, *et seq.* By its action, New Hampshire seeks to impose a condition on the use of electrical energy generated at project works licensed by the FERC under Part I. This action is preempted because Congress, by Part I, has completely occupied the field of the licensing of hydroelectric projects, leaving no room for state regulation. New Hampshire's action also stands as a manifest obstacle to the accomplishment of the full purposes and objectives of Congress by inhibiting and disrupting the FERC's Part I licensing authority. New Hampshire's action, if permitted, would deprive the FERC of its existing authority to condition a license to require interstate interconnection, coordination and transmission by the licensee and others while permitting New Hampshire to arrogate to itself the authority effectively to determine who is to receive a license under Part I.

New Hampshire's action, if permitted, will inhibit the efficient and economic utilization of electrical generation and transmission throughout the New England region, even though national policy and the overall interest of consumers, including those in New Hampshire, lie in the encouragement of such coordination.

ARGUMENT

I.
THE STATE OF NEW HAMPSHIRE HAS ERECTED A DIRECT AND IMPERMISSIBLE BARRIER TO INTERSTATE COMMERCE.

The framers of the Constitution recognized that the national welfare would best be served by the free flow of interstate commerce. U.S. Const. Art. I, §8, cl. 3. Nowhere is the wisdom of that conclusion better illustrated than in the commerce in electrical energy and services. With the continued development and refinement of technology and dramatically escalating construction and fuel costs, the electric utility industry has generally come to recognize the benefits, indeed the practical necessity, of the coordination and integration of electric power facilities and service. Congress has long recognized and encouraged regional coordination and integration of such facilities and services. See Section 202(a) of the Federal Power Act, 16 U.S.C. 824a(a). Such coordination, however, is wholly dependent for its continued effectiveness upon the irrelevence, for this purpose, of "artificial" restraints such as the vagaries of ownership and governmental boundaries. Participants in the nation's major power pools, such as the New England Power Pool, plan and operate their facilities in concert for reliability and economic operation, without regard to ownership or state boundaries. By its decision denying export of the economic benefits of hydroelectric resources located within its borders, New Hampshire has reintroduced these restraints and erected an impermissible barrier to the free flow of electrical sales and service among the New England States.

This conclusion rests squarely upon long-standing interpretations of the permissible scope of state

interference with and burdens upon interstate commerce. When called to pass upon the constitutionality of an Oklahoma statute which prohibited the export of wild fish caught in Oklahoma waters, this Court, referring to *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), articulated the test of whether the burden imposed on interstate commerce was permissible under the Commerce Clause as:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. *Oklahoma*, 441 U.S. 322, 336 (1979). New Hampshire has not sought or even purported to regulate evenhandedly, nor does its action have merely an incidental effect on interstate commerce. New Hampshire's action discriminates against interstate commerce by reserving to New Hampshire and denying to its sister States in New England the entire economic benefits of that portion of the relatively inexpensive hydroelectric energy generated within its borders.

The New Hampshire Commission sought to justify its action by citing current economic conditions within New Hampshire and New England which it contended merited this result. J.S. App. 29a-33a.[3] Specifically, the Commission noted, *inter alia*, that New Hampshire has recently had a population growth at a rate in excess of

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[3]The designation "J.S. App." refers to the appendix to NEPCO's Jurisdictional Statement in U.S. Sup. Ct. Docket No. 80-1208.

the New England region as a whole, with the result that "consumers in Massachusetts and Rhode Island have been receiving ever increasing levels of New Hampshire hydroelectric power per customer while New Hampshire has been receiving dramatically lesser [sic] power on per customer basis [sic] from units located within the State." J.S. App. 30a. The Commission found that NEPCO's control of 419.8 MW of New Hampshire hydroelectric capacity (as compared to Public Service Company of New Hampshire's 48 MW), while NEPCO serves only 6% of New Hampshire's population, and exports the remainder in interstate commerce, was "a major reason for higher costs per KWH of PSNH." J.S. App. 32a.[4] In light of these and the other factors noted, the Commission concluded that "there has been a demonstrated need for the hydroelectric power presently being exported outside the State and that it is reasonably required for use within the State." J.S. App. 35a. In sustaining these findings, the court below characterized the intent underlying the Commission's action succinctly: "Its purpose is to give New Hampshire the benefit of that power of which its residents now get only about six per cent." J.S. App. 11a. The law is clear that no such result is permissible.

The instant case is analogous[5] to *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923). There, the State of West

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[4]Public Service Company of New Hampshire, of course, now receives 100 MW of capacity from four operating nuclear plants in Massachusetts, Connecticut, Maine, and Vermont, according to its Form 1 filed with the FERC (at p. 422). This out-of-state capacity substantially lowers PSNH's costs.

[5]The premise of New Hampshire's action is that the water power in question is a native New Hampshire resource. This premise is false. The Connecticut River, on which NEPCO's six New Hampshire projects are located, is navigable water of the United

Virginia, in the face of dwindling domestic gas reserves, sought to impose a statutory preference for domestic consumers, present and prospective, and to permit only surplus gas to be delivered to other States, such as Pennsylvania. The issue presented, therefore, was whether the enforced withdrawal of West Virginia gas from interstate commerce for the benefit of its own domestic consumers was such an interference with interstate commerce as to be forbidden to a State by the Constitution. The Court held:

> [I]t is in effect an attempt to regulate the interstate business to the advantage of the local consumers. But this she may not do.

262 U.S. at 597-598. The Court articulated the controlling considerations in its determination in the following manner:

> By the Constitution, Art. I, § 8, cl. 3, the power to regulate interstate commerce is expressly committed by Congress and therefore impliedly forbidden to the States. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation.

States. *Bellows Falls Hydro-Electric Corp., 2 F.P.C. 380 (1941).* Rather than the possession of New Hampshire, the Connecticut River is "the public property of the nation, and subject to all the requisite legislation by Congress." *Gilman* v. *Philadelphia,* 70 U.S. *(3 Wall.) 713, 725 (1866). See Wyandotte Transportation Co.* v. *United States,* 389 U.S. 191, 201 (1967); *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, 334 (1958). New Hampshire seeks to appropriate a national resource which, through fortuity, is located within its borders.

Id. at 596.

In reaching this conclusion the Court addressed and rejected an argument remarkably similar to one here advanced by New Hampshire.

> Another consideration advanced to the same end is that the gas is a natural product of the State and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the State. If the situation be as stated, it affords no ground for the assumption by the State of power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere.
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> . . . If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out.

Id. at 598-599.

Recent decisions of this Court make it clear not only that a State may not prefer local commerce over national or local consumers over national,[6] but also that

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[6]*Hughes* v. *Oklahoma*, 441 U.S. 322 (1979); *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429 (1978); *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977).

it may not discriminate against interstate commerce in order to protect what it may view as the financial well-being of its citizens. In *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), the Court passed on a challenge to the constitutionality of a New Jersey statute which provided, *inter alia*, that no solid or liquid refuse from neighboring States was to be imported into New Jersey until the head of New Jersey's Department of Environmental Protection determined that such importation posed no danger to the public health and safety. Several domestic landfill operators and large cities in adjacent States brought suit challenging the New Jersey statute on a variety of state and federal grounds. The Court addressed the dispositive question of whether the law created an impermissible burden on interstate commerce.

At the outset, the Court voiced its long-standing alertness to the evils of "economic isolation" and protectionism. Reasoning from its decision in *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949), the Court stated:

> Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.

437 U.S. at 624. The Court went on to find that the New Jersey law, on its face, discriminated against interstate commerce and was thus violative of the Commerce Clause. *Id.* at 627.

In reaching its decision in *Philadelphia* v. *New Jersey*, the Court directly confronted and rejected the asserted economic and health justifications underlying the New Jersey Act. The Court reviewed the New Jersey Supreme Court's findings that the existing site landfills would be exhausted within a few years; that the use of these sites or the development of new sites would exact a heavy

environmental toll on the State; that there was an absence of ready methods of disposal and resource recovery; and finally, that the extension of the lifespan of existing landfills resulting from the exclusion of out-of-state waste could be of crucial importance in preventing further virgin wetlands or other undeveloped lands from being devoted to landfill purposes. *Id.* at 625. The Court also heard contrary argument that the legislative purpose of the Act was primarily financial: to forestall the day when, owing to the exhaustion of their own landfills, New Jersey cities would have to transport their waste to more distant and expensive sites. The Court found it unnecessary to pass on the legislative purpose of the Act.

> Thus, it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Id. at 626-627 (emphasis in original).

The impact of *Philadelphia* v. *New Jersey* on the instant case is clear. Whatever the justification for its action, no matter how legitimate its local interest, New

Hampshire may not seek to advance its local interests by erecting barriers to interstate commerce.

The court below sought to distinguish the PUC's reservation of the entire economic benefit of this commerce to New Hampshirites from the actual termination of the commerce on the ground that the energy will physically continue to flow in transmission lines to Massachusetts and beyond. J.S. Ap. 11a. Such a distinction, if accepted, would constitutionally permit a State discriminatorily to tax an article of commerce on export to the full extent of its value, as long as that State did not actually prohibit the physical flow of the commerce. Clearly, no such result would be permissible. It is impossible to separate the economic value of an article of commerce from the article itself. Were the resource here at issue coal, New Hampshire would be unable to obtain for itself the entire economic benefit of that commodity without the prohibition of its physical traffic. Only the unique physical properties of electricity ostensibly permit the distinction which the New Hampshire Supreme Court invokes. The manner of impact on interstate commerce is of no consequence in this dispute. *Philadelphia* v. *New Jersey, supra* at 628. "What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Ibid.*

The sole purpose for New Hampshire's action is to protect the economic welfare of its electrical consumers.[7] The above authorities make it clear that the pursuit of domestic economic protectionism cannot

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[7]As stated by the court below:

> The economic needs of New Hampshire consumers are such that the public good requires that the hydroelectric power be delivered for their use instead of being exported.

legitimize such a manifest barrier to interstate commerce as has been erected by New Hampshire. New Hampshire's recognition of the constitutional infirmity of its action led to its reliance upon Section 201(b) of the Federal Power Act as a congressional grant of the authority to interrupt interstate commerce in this manner. As Customers will demonstrate, this reliance is misplaced.

II.
SECTION 201(b) OF THE FEDERAL POWER ACT DOES NOT CONFER UPON NEW HAMPSHIRE THE AUTHORITY TO IMPEDE, OBSTRUCT, OR REGULATE INTERSTATE COMMERCE IN HYDROELECTRIC ENERGY PRODUCED WITHIN ITS BORDERS.

New Hampshire, through the actions of its Public Utilities Commission, has undertaken the extraordinary step of refusing to permit the export of electricity generated within New Hampshire by hydroelectric units from the State. While the evil of this erected barrier to the flow of electrical current is extreme, New Hampshire's action is in some respects even more far-reaching: it would essentially require the transfer of ownership rights to electricity and (presumably) the substitution of other and alternative rights from non-hydroelectric units. The Commission claimed

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J.S. Ap. 14a. *Contrast, Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 10 (1928), wherein this Court held:

> A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.

jurisdiction over export of hydroelectric energy under NH RSA 374:35. The Commission also recognized that it would be without jurisdiction to impede the flow of resources in interstate commerce but for its interpretation of Section 201(b) of the Federal Power Act. J.S. App. 25a-26a.

In sustaining the Commission's action, the court below was equally cognizant of New Hampshire's ostensible intrusion into the realm of federal regulation, noting that "it might be questionable, in the absence of § 201(b) of the Federal Power Act, that there would be authority for New Hampshire to interdict the flow of electricity that would otherwise continue to benefit two sister States." J.S. App. 10a. Indeed, the New Hampshire Supreme Court sought to distinguish the numerous cases in which this Court "has ruled that parochial State laws that impede the flow of goods or natural resources into interstate commerce are infirm under the commerce clause" on the ground that "none of them involved the *express consent* of Congress in the exercise of its commerce power." J.S. App. 11a (emphasis added). An analysis of New Hampshire's action begins, therefore, with whether §201(b) is reasonably subject to such an interpretation. A review of the language and legislative history of this provision leads inevitably to a contrary conclusion.

Preliminarily, we note that the court below sought to assert the validity of the State's action on the basis that it was simply a matter of the "assignment of the power." J.S. App. 12a. Thus the power would continue to flow on the interstate transmission grid as it had before, but the economic benefits would be stripped therefrom and "assigned" to the citizens of New Hampshire. It is not at all clear that the result, which does not regulate the export of the power, but only its price at export,

complies with the terms of that portion of Section 201(b) relied upon by the court. New Hampshire could not, of course, under the Federal Power Act, sever all electrical ties to other States, nor could it survive electrically were it to do so. We assume, however, for purposes of this analysis, that its action is a regulation of the exportation of hydroelectric energy.

Section 201(b) states, in relevant part:

> The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or *deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.*

16 U.S.C. 824(b) (emphasis added). The Commission interpreted the italicized portion of this Statute as a decision by Congress which "specifically authorized the State of New Hampshire to exercise that control." J.S. App. 19a. The court below reached the same conclusion. J.S. App. 7a-8a. It is in this language that the Commission found the "specific grant of authority," J.S. App. 20a, and the court discerned the "express consent" of Congress to the regulation of interstate commerce by New Hampshire and three other States. J.S. App. 11a. This reasoning, however, falls with an examination of its premise. Rather than creating an exception to the otherwise plenary jurisdiction of the Federal Power Commission[8] to regulate interstate

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[8]The Federal Power Commission ("FPC") is now the Federal Energy Regulatory Commission ("FERC"). For purposes of this issue, the two are interchangeable.

commerce in electricity for these four among all of the then forty-eight States by explicit words of affirmative grant, Congress chose to craft §201(b) in language of restriction. Section 201(b) is a restriction on the authority of the Federal Energy Regulation Commission. The language of this provision delimits the breadth of federal authority, expressly withholding that authority in the face of "lawful authority now exercised" by the States. Contrary to New Hampshire's interpretation, however, Congress did not purport by this language to pass on the legality or constitutionality of the state statute here at issue. As the Report of the House of Representatives in which the language in question was added makes clear,[9] this amendment simply assured that the Statute would not apply to "deprive a State of *any lawful* authority *now exercised* over the exportation of hydroelectric energy transmitted out of the State." (emphasis added).

While the words of Congressman Rogers of New Hampshire relied upon by the court below express his "hope" that Congress would grant to New Hampshire the privilege to regulate interstate commerce in hydroelectric energy generated within that State,[10] it is quite clear that Congress chose a different course.[11]

[9]H.R. Rep. No. 1318, 74th Congress, 1st Sess. 27 (1935).

[10]79 *Cong. Rec.* 10527 (1935).

[11]The New Hampshire Supreme Court's reliance upon footnote four in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 300-301 (1953) is likewise misplaced. In concluding that §201(b) did not go beyond §201(a), 16 U.S.C. 824(a), in limiting federal authority under Part II of the Federal Power Act, 16 U.S.C. 824, *et seq.*, the Court noted that the statements of Congressman Rogers *indicated* that the provision

Rather than specifically granting the authority to regulate interstate commerce, specifically analyzing the constitutional validity of the state statutes in question, Congress chose merely to avoid the issue — to preserve to New Hampshire and three other States whatever lawful authority might arguably have existed.

As demonstrated above, *supra* at 7-9, in 1935 the authority here sought to be exercised by New Hampshire clearly did not legally exist. The ability of a single State to arrogate to its citizens the benefits of its native natural resources, to the derogation of interstate commerce, had long been resolved, this Court having found that the Constitution mandates the service of national over parochial interests. *Oklahoma* v. *Kansas Natural Gas Company*, 221 U.S. 229 (1911); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923). By its decision in *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Company*, 273 U.S. 83 (1927), this Court held that the States were without authority to regulate interstate wholesale rates in electricity. Viewed in this context, the intent of Congress in its choice of the language "lawful authority now exercised" in Section 201(b) becomes clear. Congress chose not to analyze the legitimacy and constitutionality of the state statutes in question. Congress chose, instead, to leave the question of the viability and import of those statutes to a later day. It is that question which is this day placed before the Court for resolution.

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was intended to preserve the validity of the state statutes "prohibiting or regulating the volume of" hydroelectric energy exported. *Ibid.* The Court did not, however, reach the necessary legal issue of whether those statutes were valid prior to the passage of § 201(b). The question here at issue, therefore, was not before the Court.

III.

NEW HAMPSHIRE'S ACTION CONSTITUTES AN IMPERMISSIBLE INTRUSION INTO A FIELD PREEMPTED BY PART I OF THE FEDERAL POWER ACT.

The Supremacy Clause mandates that the "Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. It is axiomatic that all state provisions which conflict with federal laws are without effect. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). Federal displacement of state regulation may result in several ways.

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co.* v. *Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines* v. *Davidowitz*, 312 U.S. 52.

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). So too, the displacement of state regulation will result where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Customers submit that New Hampshire's actions run afoul of these principles. New Hampshire has transgressed the FERC's plenary licensing jurisdiction under Part I of the Federal Power Act by, in effect, imposing upon the license granted to NEPCO by the FPC an additional condition which prohibits the use

by the licensee of hydroelectric energy generated by the licensed project works. New Hampshire's actions also stand as a manifest obstacle to the accomplishment of the full purposes and objectives of Congress by inhibiting and disrupting the federal licensing scheme. Either result is sufficient to compel the avoidance of New Hampshire's action.

A. Part I of the Federal Power Act Constitutes a Comprehensive Scheme of Federal Regulation Which Leaves No Room for the States to Supplement It.

Through the enactment of Part I of the Federal Power Act, Congress sought to secure "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so." *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 180 (1946). The Act embodies "the full measure of Congress' authority under the Commerce Clause to regulate hydroelectric projects,"[12] and its legislative history evidences the broad intent "to secure federal control over all water power projects involving the utilization of the Nation's river systems."[13] Subsequent amendments to the Act sharpened the line between state and federal jurisdictions and "helped make it clear that the Federal Government was assuming responsibility through the Federal Power Commission for the granting of appropriate licenses" for the development of water power resources in the Nation's

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[12] *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 107 (1965).

[13] *Id.* at 108.

navigable waters. *First Iowa, supra* at 172, fn. 17.

Congress clearly recognized that the comprehensive development of the Nation's water power resources required that the development be administered by a single hand. It is for this reason that Congress determined that the comprehensive planning which the Act requires would depend upon the judgment of the Federal Energy Regulatory Commission.[14] It is in that body that the responsibility for determining the appropriate conditions upon which the Nation's water resources will be developed is vested. The FERC is to determine which proposed plan is "best adapted" to a comprehensive plan for improving or developing a waterway or waterways. In reaching its decision, the Commission must consider the impact of the project on the full spectrum of commerce interests. *Union Electric, supra* at 101.[15] While Congress expressly permitted some matters attendant to licensed projects to be subject to state regulation,[16] the authority to determine the appropriate license conditions, the primary means by which the FERC may ensure that a project is best adapted to a comprehensive development plan, rests solely with the FERC. Congress left no room for state regulation in this area.

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[14]§10(a) of the Federal Power Act, 16 U.S.C. 803(a). *First Iowa, supra* at 164.

[15]As one court noted, the "best adapted" standard "does not merely require that th elicense suit the public interest, or be appropriate, but in effect imposes a 'highest and best use' standard." *Municipal Electric Ass'n of Mass.* v. *Federal Power Commission*, 414 F.2d 1206, 1207 (D.C. Cir. 1969).

[16]See, e.g., Sections 19 (16 U.S.C. 812), 20 (16 U.S.C. 813), and 27 (16 U.S.C. 821).

The New Hampshire action here at issue imposes upon NEPCO's licenses an additional condition not imposed by the FPC and which is inconsistent with the statutory scheme of the Federal Power Act. The FPC did not deem it appropriate or necessary, in finding NEPCO's project proposals best adapted, to condition NEPCO's licenses to restrict the sale of the output of NEPCO's projects within the boundaries of the State of New Hampshire.[17] The FPC not having so conditioned these licenses, New Hampshire is disabled from acting in a manner which will impose such a requirement.

It is, of course, not necessary that the Court find New Hampshire's action inconsistent with the FERC license conditions in order to conclude it is invalid. Where, as here, Congress has so occupied the field of regulation, no room is left for even consistent state regulation. *Pennsylvania Railroad Company* v. *Public Service Commission,* 250 U.S. 566 (1919). This conclusion is consistent with the result in *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151 (1978). There the Court found that Congress intended the Nation to speak with one voice with respect to oil tanker safety design and struck down an attempt by the State of Washington to impose higher safety standards. The Court found it was clear that the federal tanker design statute left "no room for the States to impose different or stricter design requirements than those which Congress has enacted." *Id.* at 168. Congress has likewise determined that the interests of the Nation are best served if the development of its water power resources is guided by one hand. New Hampshire is legally incapable, and has been since the 1920 passage of

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[17]Since Section 10(a) requires that the project be best adapted to the "benefit of interstate or foreign commerce," the opposite conclusion would appear appropriate.

the Federal Water Power Act,[18] of adding requirements as to the use of power generated by a project licensed under Part I.

Admittedly, New Hampshire's action does not purport to be an assertion of licensing authority. New Hampshire would prefer that the PUC's Order be deemed an exercise of regulatory function unrelated to that of the FERC under Part I. J.S. App. 20a. It is by the effect rather than the form of New Hampshire's action that this Court will measure its constitutionality. *Maryland* v. *Louisiana*, ____ U.S. ____, 101 S. Ct. 2114, 2130 (1981).The PUC's Order restricts the free exercise of the franchise granted the licensee in a manner heretofore not restricted by the FERC. In light of Part I, New Hampshire is without authority so to constrain NEPCO.

B. New Hampshire's Action Stands as an Obstacle to the Accomplishment of the Full Congressional Purposes and Objectives of Part I.

The court below found that the actions of the PUC did not fall before the comprehensive statutory and regulatory scheme of Part I because, unlike the state regulation at issue in *First Iowa, supra*, the PUC's Order did not constitute a condition precedent to the grant of a FERC license. J.S. App. 5a. The New Hampshire Supreme Court therefore found there was no conflict between the federal scheme and New Hampshire's action. *Ibid.* A state action need not directly conflict with federal regulation, however, to be constitutionally infirm. If the state statute or regulation stands as an

[18]Now Part 1 of the Federal Power Act.

obstacle to the accomplishment and execution of the full purposes and objectives of Congress, it likewise must fall. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). New Hampshire's action stands as such an obstacle.

New Hampshire asks this Court to accept an anomaly. The purpose of Part I is to ensure the comprehensive development of the Nation's resources to the full extent of Congress' ability to do so. *First Iowa, supra* at 180. The principal use to be developed and regulated in the Act "was that of hydroelectric power to meet the needs of an expanding economy." *Union Electric, supra* at 99. Yet New Hampshire's action, which interdicts the Nation's commerce in hydroelectric energy, is asserted to be consistent with this Congressional goal. While the legislative history of Part I evidences Congress' manifest belief that the development of the Nation's water power resources "is of paramount importance to the people of the United States,"[19] the PUC's Order gives ascendency to the local needs of the citizens of New Hampshire.

The extent to which the PUC Order disrupts the federal regulatory scheme is illustrated by its effect upon the actual authority of the FERC to condition the issuance of licenses under Part I. Section 10(a) requires as a condition for obtaining a license that a project be, in the FERC's judgment, "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce." One of the means by which the FERC may ensure that this standard is met is to condition the grant of a license upon interstate

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[19] 59 *Cong. Rec.* 241, 244 (remarks of Senator Jones in introducing the bill).

interconnections, coordination and transmission by the licensee and others.[20] The FERC may also condition the license upon sale of a portion of the output of the

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[20]The authority of the Federal Power Commission so to condition a license is clear from the hearings on the Water Power Act:

> MR. ANDERSON. Suppose you have two units in the same region, both of them asking for licenses. You have the power to refuse both licenses. Would not that power of a refusal be an implement to require an interconnection between those plants for development in a certain way?
>
> MR. MERRILL. That is true .... In issuing a license the commission could put on such restrictions or conditions as it wished and which were within the powers granted under the bill.
>
> MR. ANDERSON. Then it would be within the power of the commission under the license provision of this bill to require an interconnection between the plants as a condition to the granting of the license?
>
> MR. MERRILL. I think it would; yes.
>
> MR. LEVER. Is that so intended?
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> MR. MERRILL. That would be covered, I think, under this general provision, page 14, section 10:
>
> > That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization.

Hearings before the Committee on Water Power of the House of Representatives, 65th Cong., 2d Sess. 24 (March 18 to April 4 1918). *See also FPC* v. *Idaho Power Co.*, 344 U.S. 17, 23-24 (1952).

project in interstate commerce.[21] With the growing size and capacity of hydroelectric projects, the need for a project is often assessed on the basis of an interstate market. See, e.g., *Appalachian Power Co.*, 51 F.P.C. 1906 (1974),[22] wherein the FPC determined the need for a pumped storage project to be located in North Carolina and Virginia on the basis of the electrical needs of the "East Central Region of the United States." *Id.* at 1919. The PUC Order, if permitted, would require the FERC to abandon these means of ensuring the appropriate discharge of its congressional mandate in deference to the dictates of the State of New Hampshire. No such deference is necessary or permissible. *Maryland* v. *Louisiana*, ____ U.S. ____, 101 S. Ct. 2114, 2131 (1981).

The Congressional provision for the relicensing of projects whose FERC project licenses have expired further illustrates the repugnancy of New Hampshire's action to the comprehensive federal regulatory scheme

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[21] See, e.g., *Power Authority of the State of New York*, 12 F.P.C. 172 (1953), *aff'd sub nom. Lake Ontario Land Development & Beach Protection Ass'n, Inc.* v. *FPC*, 212 F.2d 227 (D.C. Cir.), *cert. denied*, 347 U.S. 1015 (1954), wherein the FPC found:

> Under these circumstances, it is in the national interest to develop these water resources to serve broad public interests. In order to insure conformance with comprehensive plans of development, the power should be made available not only in New York State, where the generators are to be located, but within economic transmission distance in nearby States.

Id. at 177. The FPC so conditioned that license and further reserved the authority to determine and fix the available portion of power capacity and output to be made available by the licensee to the neighboring States in the event of disagreement among the licensee and the other states. *Id.* at 192-193.

[22] *Aff'd sub nom. North Carolina* v. *FPC*, 533 F.2d 702 (D.C. Cir.), *vacated on other grounds*, 429 U.S. 891 (1976).

of Part I. Under Section 7(a) of the Act, 16 U.S.C. 800(a), no perpetual license may be granted, and, at the expiration of the original license, the FERC is to accord States and municipalities a preference in determining who should be permitted to receive a new license to operate an existing project. In Opinion No. 88, the FERC concluded that Congress intended municipal entities such as Customers to have a preference on recapture of such licenses.[23] The PUC Order here at issue would effectively preclude Customers and NEPCO from competing for the expired licenses of the six projects at issue solely because Customers and NEPCO are located on the "wrong side" of the Massachusetts-New Hampshire border. This would constitute the effective arrogation to New Hampshire of the authority and responsibility expressly delegated by Congress to the FERC to determine the appropriate licensee to develop and exploit the Nation's water resources. Such a result does violence to the Congressional statutory scheme established by Part I.

C. Section 201(b) Does Not Preserve to New Hampshire the Right to So Disrupt the Comprehensive Scheme of Part I.

The proviso to Section 201(b) is, by its terms, a limitation on the breadth of federal preemption under Part II of the Federal Power Act. As the prior discussion demonstrates, however, New Hampshire's action stands at odds with the congressional mandate of Part I. The PUC's Order intrudes into an area of regulation fully

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[23] *City of Bountiful, Utah*, 20 F.P.S. 5-921 (1980). Opinion No. 88 is currently on appeal to the United States Court of Appeals for the Fifth Circuit in *Alabama Power Co. v. Federal Energy Regulatory Commission, appeal docketed*, No. 80-7641 (Aug. 21, 1980).

occupied by Congress, which permits no coincident state regulation. The Order also severely disrupts the comprehensive federal scheme for the development of the Nation's rivers and substantially inhibits the full attainment of the purposes for which Part I was created. No one has yet to suggest that there is the slightest indication that Congress, in accepting the proviso of Section 201(b) of Part II, intended the wholesale evisceration of Part I.

IV.

NEW HAMPSHIRE'S ACTION, IF PERMITTED, WILL FRUSTRATE THE PROVISION OF EFFICIENT AND ECONOMIC ELECTRICAL SERVICE IN NEW ENGLAND THAT RESULTS FROM REGIONWIDE COORDINATION AND INTEGRATION OF GENERATION AND TRANSMISSION RESOURCES.

State attempts to protect local economic interests to the derogation of interstate commerce have been consistently rejected by the Court as tending to the economic Balkanization of relations among the States. *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 534 (1949). *See Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), an attempt to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition; *Foster-Fountain Packing Company* v. *Haydel*, 278 U.S. 1 (1928), an attempt to create jobs by keeping industry within the state; *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911) and *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), attempts to accord domestic consumers a preferred right of access to native natural resources over the consumers of other States.

In no other form of commerce is the potential harm to the national welfare from Balkanization as great as in the area of the provision of electrical energy and services. And in no other commerce is the product so naturally amenable to the interstate market. Unlike highway safety standards or health standards for the processing of milk, the question of the size, exportation, or sort of electrical generating capacity is not a subject which can even be argued to be uniquely local in character. Electrical energy is a commodity which, once produced by a generator connected to an interstate power pool, is inexorably in commerce. *Public Service Co. of Indiana,* v. *FPC,* 375 F.2d 100, 103 (7th Cir.), *cert. denied,* 387 U.S. 931 (1967); *Cincinnati Gas & Electric Co.* v. *FPC,* 376 F.2d 506, 508 (6th Cir.), *cert. denied,* 389 U.S. 842 (1967). Such energy knows no state boundaries and inevitably flows over whatever transmission facilities exist from one State to another. *FPC* v. *Florida Power & Light Co.,* 404 U.S. 453 (1972).

The New Hampshire Commission decision prevents the free interchange of electrical resources and services. The inevitable result is a tendency toward the development of independent state generating resources designed to insure each State energy self-sufficiency, in sharp contrast to the national trend towards increased coordination and integration of electrical generating and transmission facilities. A recent report of the Economic Regulatory Administration emphasized the myriad benefits to be achieved through such action.

> *Full coordination of* planning, development, and operations is likely to reduce the capital and fuel requirements of utilities. It would facilitate implementation of policies to minimize use of scarce fuels, or to develop

> abundant natural resources. It would tend to increase overall system reliability and emergency response capability. It would spread the risk of forecast errors and construction delays. Lastly, it would decrease the incentives for acquisitions among utilities since economies of scale would be available to all participants.

National Power Grid Study, Executive Summary, Economic Regulatory Administration 15 (1980) (emphasis in original). New Hampshire's actions, in preventing the export of its hydroelectric resources, would roll back this trend. it would render significantly more difficult, if not impossible, the fully coordinated operation of New England's electrical systems, to the economic detriment of the region's consumers. The question is thus clearly placed: is the greater good served in the use of these resources for the benefit of New Hampshire, or the region as a whole? The New Hampshire decision breaks the integrated system at the New Hampshire state line and inhibits commerce across that line for the intended though most assuredly shortrun benefit of New Hampshire citizens alone. Such a result is repugnant to the Constitution.

CONCLUSION

For the reasons stated above, the decision below should be reversed.

Respectfully submitted,

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July 24, 1981

APPENDIX

APPENDIX A

The Unaffiliated Massachusetts Municipal Wholesale Customers of New England Power Company comprise the following Cities and Towns of Massachusetts:

Ashburnham,
Boylston,
Danvers,
Georgetown,
Groton,
Hingham,
Holden,
Hudson,
Hull,
Ipswich,
Littleton,
Manchester,
Marblehead,
Merrimac,
Middleton,
North Attleborough,
Paxton,
Princeton,
Shrewsbury,
Sterling,
Templeton,
Wakefield,
and
West Boylston

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Nos. 80-1208, 80-1471, 80-1610

In the Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY, APPELLANT

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.

COMMONWEALTH OF MASSACHUSETTS, ET AL., APPELLANTS

v.

NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL, ET AL.

DENNIS J. ROBERTS, II, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, ET AL., APPELLANTS

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether a state statute that prohibits the transmission or sale of hydroelectric power generated in that state to other states without the authorization of the State Public Utility Commission is preempted by the Federal Power Act and therefore violates the Supremacy Clause of the Constitution.

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BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

This case presents an important question concerning the scope of permissible state authority within the federal regulatory scheme established by the Federal Power Act. Part I of the Federal Power Act (16 U.S.C. (& Supp. III) 791a *et seq.*) accords the Federal Energy Regulatory Commission comprehensive licensing authority over the nation's water power resources in order to benefit interstate commerce. Part II of the Act gives the Commission regulatory ratemaking authority over various aspects of the transmission and sale of electric energy in interstate commerce, including transmission and sales from hydroelectric projects licensed under Part I.

Here, the New Hampshire Supreme Court held that a New Hampshire statute which prohibits the export of hydroelectric energy generated in that state, without the permission of the state public utility commission, was authorized by Section 201(b) of the Federal Power Act (16 U.S.C. (& Supp. III) 824(b)). The United States and the Federal Energy Regulatory Commission believe that Congress did not intend the Commission's administration of the Federal Power Act to be subordinated or subjected to such state administrative orders. Under the decision below, the Commission would be required to administer the Federal Power Act in accordance with the terms and conditions placed by each state upon the transmission and sale in interstate commerce of electricity generated from the resources within that state. Moreover, the New Hampshire court's decision sharply departs from the congressional policy to promote the regional pooling of energy producing resources, which the Commission has consistently encouraged with its efforts to provide nationwide coordination in the use of scarce energy resources.

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court (J.S. App. 1a-14a)[1] is not yet reported. The New Hampshire Public Utilities Commission's Report and Order dated August 27, 1980 (J.S. App. 15a-24a) and its Report and Order dated September 19, 1980 (J.S. App. 25a-40a) are also unreported.

JURISDICTION

This is an appeal from a final judgment of the New Hampshire Supreme Court upholding the constitutionality of a New Hampshire statute prohibiting the export of hydroelectric energy generated within the state. The judgment of the New Hampshire Supreme Court was entered on December 23, 1980, upon the docketing of the decision by the clerk. Notices of appeal were filed on January 12, 1981 (J.S. App. 41a; 80-1610 J.S. App. 1a) and on January 15, 1981 (80-1471 J.S. App. 3a). The appeals were docketed on January 19, 1981 (No. 80-1208), February 27, 1981 (No. 80-1471), and March 23, 1981 (No. 80-1610). This Court has jurisdiction of the appeal under 28 U.S.C. 1257(2) because the constitutionality of a state statute is drawn into question and the decision below was in favor of its validity. The Court noted probable jurisdiction on May 18, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 (the Commerce Clause) and Article VI, Clause 2 (the Supremacy Clause) of the United States Constitution are set forth at J.S. 3.

Section 374:35 of the New Hampshire Revised Statutes Annotated (1966 repl.) is set forth at J.S. 2. Sections 4(e), 10(a), 23(b), and 201(a) and (b) of the Federal

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[1] Unless otherwise specified, "J.S. App." refers to the appendix to the Jurisdictional Statement in No. 80-1208.

Power Act (16 U.S.C. 797(e), 803(a), 817(b), and 824 (a) and (b)) are set forth at J.S. App. 42a-46a.

STATEMENT

1. Appellant, New England Power Company (NEPCO),[2] is a public utility which generates electric energy from six hydroelectric projects located on the Connecticut River in New Hampshire and Vermont. Those projects are licensed by the Federal Energy Regulatory Commission under Part I of the Federal Power Act, 16 U.S.C. 792-823. The energy generated from the hydroelectric projects is transmitted and sold by NEPCO at wholesale in Massachusetts, Rhode Island, and New Hampshire in accordance with tariffs and rates approved by the Commission under Part II of the Federal Power Act, 16 U.S.C. (& Supp. III) 824-824k. Because NEPCO is a member of a highly-integrated regional power pool, which is operated as a single unit, the power it generates is transmitted throughout New England (J.S. App. 2a-3a).

On November 21, 1979, the New Hampshire Public Utilities Commission commenced an investigation under N.H. Rev. Stat. Ann. § 374:35 (1966 repl.) to determine whether it should revoke its earlier approval of the exportation of electric power generated from appellant's hydroelectric facilities located in New Hampshire. The state statute under which the State Commission proceeded was first enacted in 1913. It provides as follows:

> *Transmitting Electricity Out of the State Permission Required.* No corporation engaged in the generation of electrical energy by water power shall

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[2] References to "appellant" are to New England Power Company, the appellant in No. 80-1208. Separate appeals have been docketed by the Commonwealth of Massachusetts (No. 80-1471), and by Dennis J. Roberts, II, Attorney General of Rhode Island, and Edward F. Burke, Administrator of Rhode Island Division of Public Utilities and Carriers (No. 80-1610). These appellants were also parties before the New Hampshire Public Utilities Commission and the New Hampshire Supreme Court.

> engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention to do so with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

After several hearings, the New Hampshire Public Utilities Commission withdrew the permission it previously had granted to appellant to transmit hydroelectric energy generated within New Hampshire outside the state (J.S. App. 2a, 40a). Prior to the instant case, the state had never withheld its permission for the exportation of hydroelectric energy (see J.S. 5; J.S. App. 3a-4a, 29a-30a). The State Commission found that the hydroelectric power was required for use within the state in order to keep the electric rates of New Hampshire residents as low as possible (J.S. App. 35a). The State Commission reasoned that "NEPCO's practice of selling to [the Public Service Company of New Hampshire (an intrastate distributor of power)] oil fired capacity while exporting New Hampshire hydro capacity" (*ibid.*) caused New Hampshire residents to pay higher rates than they would if the hydroelectric power was sold within the state.

2. The New Hampshire Supreme Court upheld the State Commission's order (J.S. App. 1a-14a). In so ruling, the court concluded that the Federal Power Act did not preempt the New Hampshire statute upon which the Commission based its order (J.S. App. 4a-8a). The

court stated that the Commission's order did not conflict with the licensing power of the federal government under Part I of the Federal Power Act, 16 U.S.C. 792-823, because the order "does not require compliance with [the state statute] as a condition precedent to securing a federal license under Part I" (J.S. App. 5a). The court observed that "New Hampshire has not sought to stop hydroelectric development of the Connecticut River and does not challenge the licenses granted to NEPCO over the years under Part I of the Federal Power Act" (*ibid.*).

The court further held that in Part II of the Federal Power Act, 16 U.S.C. (& Supp. III) 824-824k, Congress gave "express consent" (J.S. App. 11a) for the regulation imposed by the New Hampshire statute. The court acknowledged that in enacting Part II of the Federal Power Act, Congress chose to fill the gap in the regulation of the interstate sale of electric power created by constitutional limitations on state authority (see, *e.g.*, *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 90 (1927)). It nevertheless ruled that Section 201(b) of the Federal Power Act evidenced Congress' intention to allow the states to regulate in the manner provided by the New Hampshire statute. Pursuant to that provision, the Federal Power Act does not apply to intrastate retail sales of electric energy " 'or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line * * *' " (J.S. App. 6a-7a). In so holding, the court observed that "it might be questionable, in the absence of [Section] 201(b) of the Federal Power Act, that there would be authority for New Hampshire to interdict the flow of electricity that would otherwise continue to benefit two sister States * * *" (J.S. App. 10a). But it concluded that Congress could authorize the states to regulate interstate commerce and that Congress had done so in Section 201(b) of the Federal Power Act (J.S. App. 10a-11a).

Although the New Hampshire court sought to reconcile the Public Utilities Commission's order with the Federal Power Act by characterizing the order as "not a control of rates but rather a control of the assignment of the power" (J.S. App. 12a), the court acknowledged that "new rates, contract modifications, or accounting adjustments * * * may naturally flow from the export termination" (J.S. App. 14a). It accordingly remanded the case to the Public Utilities Commission, with the admonition that "[appellant] must make appropriate adjustments and filings with the appropriate federal and State administrative agencies to enable New Hampshire to regain the benefit of its hydroelectric power" (*ibid.*).

SUMMARY OF ARGUMENT

1. The order of the State Public Utilities Commission is contrary to Part II of the Federal Power Act. In that portion of the statute, enacted in 1935, Congress authorized the Federal Energy Regulatory Commission (then the Federal Power Commission) to regulate the transmission and sale of electrical energy at wholesale in interstate commerce. This part of the statute was enacted in response to a series of decisions culminating in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), which had "denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.'" *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 214 (1964). With the growth of electric utilities which crossed state boundaries, Congress found it necessary to exercise federal authority to fill the regulatory gap created by *Attleboro*. As this Court stated in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 311 (1953), "Part II is a direct result of *Attleboro*. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales."

The New Hampshire order invades the exclusive federal authority established by Part II of the Federal Power Act and therefore violates the Supremacy Clause. By its terms, it withdraws permission for appellant to sell hydroelectric power generated in New Hampshire outside the state (see J.S. App. 2a). Since the energy generated in New Hampshire is dispatched through a regional power pooling system (NEPOOL) (see J.S. App. 3a), it would be impractical to comply with the literal terms of the state commission's order without elaborate alteration of the regional power transmission lines. Hence, the New Hampshire Supreme Court anticipated that compliance would be achieved by "arrangements" that "may naturally flow from the export termination" such as "new rates, contract modifications, or accounting adjustments" (J.S. App. 14a). In this way, all of the economic benefits of the cheaper hydroelectric power would be assigned to New Hampshire consumers.

But it has been settled since at least *Attleboro* that the states have no authority to set rates or to modify contracts with respect to the interstate transmission and wholesaling of electrical energy. The teaching of *Attleboro* is that the states have no constitutional power to regulate interstate transmission and wholesales of electrical energy. Thus, in passing Part II of the Federal Power Act in 1935, Congress intended to "touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978); *Hines* v. *Davidowitz*, 312 U.S. 52, 66-67 (1941).

2. Section 201(b) of the Federal Power Act, upon which the decision below relied (J.S. App. 4a-8a), does not support New Hampshire's claim. It states that the provisions of Part II of the Act "shall not * * * deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line * * *."

Both the language and legislative history of Section 201(b) make clear that it is not, as the Supreme Court of New Hampshire mistakenly held, an affirmative grant of authority empowering the states to bar the exportation of hydroelectric energy. By its terms, it simply leaves standing, beyond the preemptive reach of the Federal Power Act, those constitutionally valid state laws that govern hydroelectric facilities. In this respect, it does no more than a host of similar "savings clauses" employed in other federal statutes. Indeed, at the time Congress enacted Section 201(b), this Court had previously held on two separate occasions that the Commerce Clause forbade a state from prohibiting the exportation of a natural resource on the ground that it was needed for its own citizens. See *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923). Nothing in the legislative history suggests that Congress intended to depart from or modify the rule of those cases.

Thus, Section 201(b) does not sanction the flat prohibition against exportation of electrical energy ordered by the State Commission here. It merely permits the states to continue to exercise whatever "lawful authority" that might exist under the constitutional holding in *Attleboro*. To conclude otherwise would vitiate the comprehensive federal regulation over the interstate transmission and sale for resale of electrical energy in interstate commerce contemplated by the Federal Power Act, in response to the *Attleboro* decision.

3. The decision below authorizing New Hampshire to regulate the sale outside the state of hydroelectric power generated within New Hampshire is also incompatible with the exclusive federal regulatory jurisdiction established by Part I of the Federal Power Act.

Appellant's six hydroelectric generating projects are licensed by the Federal Energy Regulatory Commission under Part I of the Federal Power Act. These licenses are issued on the condition, *inter alia*, that the project

"* * * will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce * * *" (16 U.S.C. 803(a)). Hence, New Hampshire' proscription of the sale of power outside the state is squarely at odds with the federal policy upon which appellant's projects were licensed, viz., that these hydroelectric projects would benefit interstate commerce. To permit New Hampshire to bar the interstate transmission of such power would vest it with a virtual "veto power over the federal project" and "would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal [Energy Regulatory] Commission." *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152, 164 (1946).

ARGUMENT

THE NEW HAMPSHIRE STATUTE PROHIBITING THE TRANSMISSION OR SALE OF HYDROELECTRIC POWER GENERATED IN THAT STATE TO OTHER STATES IS PREEMPTED BY THE FEDERAL POWER ACT AND THEREFORE VIOLATES THE SUPREMACY CLAUSE OF THE CONSTITUTION

A. The States Have No Authority to Regulate the Interstate Transmission and Wholesaling of Hydroelectric Energy

1. As this Court has observed, the principal purpose of Part I of the Federal Power Act was to promote the comprehensive development of the nation's water power resources "in so far as it was within the reach of the federal power to do so." *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152, 180 (1946).[3] Section 23(b) of the Act, 16 U.S.C. 817(b), prohibits construction of non-

[3] Part I of the Federal Power Act was enacted in 1920 as the Federal Water Power Act. See *FPC* v. *Union Electric Co.*, 381 U.S. 90, 91 n.2 (1965).

licensed hydroelectric projects on navigable streams, regardless of the effect on commerce, and further requires those proposing a project on a nonnavigable stream to file a declaration of intention and to come before the Federal Energy Regulatory Commission for a determination of whether the " 'interests of interstate or foreign commerce would be affected.' " By employing the standard " 'affect the interests of commerce,' * * * Congress drew upon its full authority under the Commerce Clause." *FPC* v. *Union Electric Co.*, 381 U.S. 90, 96 (1965).

Section 10(a) of the Act, 16 U.S.C. 803(a), requires all licensed projects to be "* * * such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce * * *." The statute thereby undertakes "to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation * * *." *First Iowa Hydro-Electric Coop.* v. *FPC*, *supra*, 328 U.S. at 181. As the Court there stated in referring, *inter alia*, to the "comprehensive plan" standard of Section 10a, "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls" (*ibid.*; footnote omitted).

In Part II of the Federal Power Act, enacted in 1935, Congress authorized the Federal Energy Regulatory Commission (then the Federal Power Commission) to regulate the interstate transmission and sale for resale of electrical energy from whatever source. This part of the statute was enacted in response to a series of decisions culminating in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), which had "denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.' " *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 214 (1964). With the growth of electric

utilities which crossed state boundaries, Congress found it necessary to exercise federal authority to fill the regulatory gap created by *Attleboro*. See S. Rep. No. 621, 74th Cong., 1st Sess. 17 (1935); H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7-8 (1935). As the Court stated in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 307-308 (1953), "Part II was intended to 'fill the gap' * * * left by *Attleboro* in utility regulation." "Part II is a direct result of *Attleboro*. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales." *Id.* at 311.

2. As we shall show, the decision below erroneously construed Section 201(b) of the Federal Power Act as an affirmative grant of authority to the states to bar the transmission of hydroelectric energy into interstate commerce. The language and legislative history of the statute, and the overall scheme of regulation, make it clear that under Section 201(b) only the exercise of a State's pre-existing "lawful authority" is beyond the preemptive reach of Part II. Thus, the "limitations established on [the Federal Energy Regulatory] Commission jurisdiction [in Section 201(b)] were designed to coordinate precisely with those constitutionally imposed on the states," *United States* v. *Public Utilities Commission of California*, *supra*, 345 U.S. at 311; they were not intended to confer new authority upon the states. Hence, where, as here, a state seeks to assert regulatory power over the interstate transmission or sale for resale of hydroelectric power, a prerogative not previously enjoyed, that action is barred by the Supremacy Clause.[4]

Moreover, the decision below is inconsistent with the Congress' policy to promote the regional and national coordination of energy resources. Under Part I of the

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[4] Because the federal Act is premised on the *Attleboro* interpretation of Commerce Clause limitations on state regulatory power, this case presents no occasion to reexamine the correctness of that interpretation.

Act, Congress sought to assure that the nation's water power resources would be developed in a manner which maximizes the benefits to interstate commerce. Under Part II of the Act, Congress intended to encourage the regional coordination of all electrical energy producing resources. The New Hampshire statute at issue here undermines both of these congressional policies.

B. The Language and Legislative History of Part II of the Federal Power Act Confirm that Section 201(b) Does Not Authorize the States to Regulate the Interstate Transmission and Sale for Resale of Electric Power

In upholding the State Public Utility Commission's order withdrawing permission from appellant to transmit hydroelectric power it generated in New Hampshire to other states, the New Hampshire Supreme Court acknowledged that "it might be questionable, in the absence of [Section] 201(b) of the Federal Power Act, that there would be authority for New Hampshire to interdict the flow of electricity that would otherwise continue to benefit two sister States * * *" (J.S. App. 10a). But Section 201(b) does not sanction such state parochialism at the expense of other states. To the contrary, the language and legislative history of Part II of the Federal Power Act confirm that Section 201(b) is not an affirmative grant of authority empowering the states to regulate the transmission and sale of hydroelectric energy in interstate commerce.

1. In Section 201(a) of the Federal Power Act (16 U.S.C. 824(a)), Congress "declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal Regulation of matters relating to generation * * * and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the

public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States" (see J.S. App. 45a). Section 201 (b) (1) of the Act (16 U.S.C. (& Supp. III) 824(b) (1)) provides as follows (J.S. App. 4a-8a; emphasis added):

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, *but except as provided in paragraph (2) shall not* * * * *deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line* * * *.

The language of Section 201(b) makes clear that it is not, as the Supreme Court of New Hampshire mistakenly held, an affirmative grant of authority empowering the states to regulate the interstate transmission and wholesaling of hydroelectric energy in interstate commerce. By its terms, it simply leaves standing, beyond the preemptive reach of the Federal Power Act, those constitutionally valid state laws that govern hydroelectric facilities. The key to a proper understanding of Section 201(b) is the term "lawful authority." The provision merely permits the states to continue to exercise whatever "lawful authority" that might continue to exist under the Commerce Clause after this Court's decision in *Attleboro*. To conclude otherwise would vitiate the comprehensive federal regulation over the interstate transmission and wholesaling of electrical energy in interstate commerce contemplated by the Federal Power Act, in response to the *Attleboro* decision. As we have pointed out (*supra*, pages 11-12), this federal regulation begins at precisely the point at which state regulation was constitutionally limited by that decision. In sum, Section 201(b) was designed to preserve only such "lawful authority" of the states that was not barred by this Court's interpretation of the Commerce Clause in *Attleboro*.

2. The legislative history of Section 201(b) supports our submission that the statute does not constitute an affirmative grant of authority empowering the states to regulate the interstate transmission and sale for resale of hydroelectric energy in the manner sought by New Hampshire in this case. As this Court recognized in *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 529 (1945), the bill that became Part II of the Federal Power Act "came before Congress as prepared by the staff of the Commission * * *." In the hearings before the responsible congressional committees, the Commission's representatives testified that the bill was drafted to complement and supplement existing state regulation of utilities without impinging upon the valid authority of the states. See *Public Utility Holding Company Act of 1935: Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess. 249 (1935); *Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess., Pt. 1, 392, 526, 529, 549 (1935). Both the draftsmen and the sponsors of the bill believed that it would not only preserve all constitutionally permissible state regulation of matters primarily of local concern, but would also strengthen the regulatory ability of the states by providing for federal regulation and information gathering that were beyond the capacity of the states. See S. Rep. No. 621, 74th Cong., 1st Sess. 17 (1935).[5] As the pertinent House Report concluded (H.R. Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935)):

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[5] In this respect, Senator Wheeler, one of the sponsors, stated (79 Cong. Rec. 8775 (1935)):

> It will be recalled that in the bill we provide in title II that nothing in this act shall in any wise interfere with State regulation. We preserved the State regulation completely in the bill, but in title II we made the positive statement that the policy should be not to interfere with State regulation, but to assist and help State regulation.

> The bill takes no authority from State commissions and contains provisions authorizing the Federal Power Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges * * * The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority * * *. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill.

The draftsmen of Part II achieved their stated purpose of complementing existing state regulation by designing the statute to limit federal jurisdiction to those areas which this Court had held were beyond the constitutional authority of the states. S. Rep. No. 621, 74th Cong., 1st Sess. 7-8 (1935); *Hearings on H.R. 5423, supra*, Pt. 1 at 523, Pt. 3 at 2143.[6] At the time Congress deliberated over the legislation that because Part II of the Federal Power Act, the decisions of this Court held that neither the generating state nor the state of consumption could regulate the transmission or sale of energy in interstate commerce. *Public Utilities Commission* v. *Attleboro Steam & Electric Co., supra* (generating state may not regulate wholesale rates). *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298 (1924) (state of consumption may not regulate wholesale rates). Indeed, in *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923) and *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U.S. 229

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[6] The primary responsibility for drafting Part II of the Act was discharged by Commissioner Seavey and Mr. DeVane, the Solicitor of the Federal Power Commission. See *Hearings on H.R. 5423, supra*, Pt. 1 at 553; *Hearings on S. 1725, supra*, at 223. Mr. DeVane stated (*Hearings on H.R. 5423, supra*, Pt. 3 at 2143):

> What we did in drawing the bill was to use the language of the Supreme Court in the *Attleboro* and in the *Pennsylvania cases*. We thought that as long as we did that, we were on solid ground and that is what we attempted to do in this bill.

The *Pennsylvania* decision to which DeVane referred is *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23 (1920), in which this Court held that the states could regulate retail utility rates.

(1911), the Court had held that a generating state may not restrict or prohibit the flow of energy into interstate commerce.

3. Given the background of the decisions against which Part II of the Federal Power Act became law, we believe that Section 201(b) of that Act cannot be read to justify the flat prohibition or restriction by a state of the exportation of hydroelectric energy generated within its borders. Such prohibitions were held to be unconstitutional prior to the enactment of Part II and there is nothing to indicate Congress' desire to establish a different rule. In striking down as violative of the Commerce Clause an Oklahoma statute designed to accomplish the retention of natural gas within the state in *Oklahoma* v. *Kansas Natural Gas Co.*, *supra*, 221 U.S. at 255, the Court stated—

> If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus, enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.

Just as West Virginia and Oklahoma could not bar the exportation of their natural gas on the ground that it was a scarce commodity needed for their own citizens, New Hampshire likewise cannot constitutionally retain the advantage of its hydroelectric energy generated within its borders by prohibiting its exportation to purchasers in other states. "These cases stand for the basic principle that a 'State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.'" *Philadelphia* v. *New Jersey*,

437 U.S. 617, 627 (1978) (footnote omitted), quoting from *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 10 (1928). See also *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979). It is therefore clear that the New Hampshire statute, "viewed independently of federal legislation regulating the [interstate transmission and sale of electric power], burden[s] interstate commerce in a manner contrary to the Commerce Clause" *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980).[7]

Nothing in the legislative history of the Federal Power Act suggests that Congress intended to grant authority to the states to erect such restrictive trade barriers. Since Section 201(b) sanctions only the exercise of "lawful authority" by the States over the "exportation of hydroelectric energy which is transmitted across a State line," it cannot be construed to support an indisputably unlawful flat prohibition against interstate transmission and sale of such energy.[8] Such a reading would be in-

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[7] *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), cited by the decision below (J.S. App. 11a), is not to the contrary. There, the Court ruled that the Commerce Clause did not forbid South Dakota, in a time of shortage, from confining the sale of the cement it produces solely to its residents. In so holding, however, the Court characterized the State as a "market participant" falling within the scope of the rule of *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976), *i.e.*, that the state was acting as a private business functioning in the marketplace. Here, on the other hand, New Hampshire is attempting to control the wholesale rates paid for hydroelectric power generated by a private business. It therefore cannot be gainsaid that it is acting in a governmental regulatory capacity in favor of its own citizens and thereby erecting barriers to trade prohibited by the Commerce Clause.

[8] The statement during the House floor debates of Congressman Rogers of New Hampshire, upon which the decision below relied (see J.S. App. 7a), speaks of "certain rights" of the States over the exportation of hydroelectric energy which is transmitted across state lines. Section 201(b) did not appear in the original Senate bill, but was inserted in the House as Congressman Rogers of New Hampshire explained, in order to insure that certain states

consistent with the comprehensive federal regulation over such sales established by Part II of the Federal Power Act. Thus, by stipulating that Part II of the Federal Power Act "shall not * * * deprive a State * * * of its lawful authority now exercised over the exportation of hydroelectric energy * * *," Congress did no more than to provide a savings clause common in federal statutes that complement existing state regulation.[9]

In sum, nothing in the language of Section 201(b) or its legislative history supports the conclusion that Congress intended to grant new authority to the states by approving the flat state prohibitions against exportation of natural resources previously struck down by this Court in *Pennsylvania* v. *West Virginia*, *supra*, and

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were not deprived of rights they then exercised over the exportation of hydroelectric energy transmitted across state lines. Congressman Rogers stated as follows (79 Cong. Rec. 10527 (1935)):

> Just one word further. I do want to call attention, if I have a moment, to the fact that as a result of the service rendered by the junior Senator from New Hampshire on the public service commission of our State, we, for a long time, have had a public service commission which properly protects the rights of the citizens as against these damnable curses; but the Senate bill as originally drawn would deprive certain States, I think five in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House committee, and I hope when you come to it, section 201 of part II, that you will grant us the privilege to continue, as we have been for 22 years, to exercise our State right over the exportation of hydroelectric energy transmitted across State lines but produced up there in the granite hills of old New Hampshire.

At that time, however, New Hampshire had not imposed the impediment to interstate commerce at issue here and could not lawfully have done so. See, *supra*, pages 17-18.

[9] See, *e.g.*, 16 U.S.C. 821, and *First Iowa-Electric Coop.* v. *FPC*, *supra*, 328 U.S. at 175-176.

Oklahoma v. *Kansas Natural Gas Co., supra.*[10] Section 201 (b) therefore does not justify the economic Balkanization that otherwise would exist if the states were permitted to impede the free flow of electricity. Indeed, one would expect that if Congress intended such a radical departure from the Court's decisions under the Commerce Clause, it would have explicitly manifested such a purpose. The indications, however, are precisely to the contrary. While the House Report discusses Section 201(b), as added by the House bill, it does not state that the change from the Senate version of the bill was intended to be a substantive change. H.R. Rep. No. 1318, 74th Cong., 1st Sess. 27 (1935). There is accordingly no reason to conclude that "Congress, by its own legislation in this area, has created an area in which the States may regulate free from Commerce Clause restraints." *Lewis* v. *BT Investment Managers, Inc., supra,* 447 U.S. at 35.

4. Even on the assumption that "the provision [in Section 201(b)] was intended to preserve the validity of certain state statutes prohibiting or regulating the *volume* of state power exported (emphasis supplied)" (*United States* v. *Public Utilities Commission of California, supra,* 345 U.S. at 300-301 n.4),[11] the order of the New Hampshire Public Utilities Commission has other consequences that plainly contravent Part II of the Fed-

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[10] Indeed, when Congress intended to grant authority to the states under the Federal Power Act or to provide joint federal and state authority, it did so in clear and unmistakable terms. For example, Section 201(a) of the Act permits the states to regulate generation of electrical energy and retail rates. Moreover, Section 302, 16 U.S.C. 825a, establishes a dual system of federal and state regulation of accounting for depreciation.

[11] The quoted statement from this Court's opinion in *United States* v. *Public Utilities Commission of California, supra,* is dictum; that case did not involve a claim in support of a statute under Section 201(b). Nor did *Safe Harbor Water Power Corp.,* 5 F.P.C. 221, 235 (1946), which the Court there cited (*ibid.*), present a question of the validity of a state prohibition against the exportation of hydroelectric energy.

eral Power Act. To be sure, the literal terms of the state commission order withdraws permission for appellant to sell hydroelectric power generated in New Hampshire outside the state (see J.S. App. 2a). However, as a practical matter, the order has a different effect. Since the hydroelectric energy generated in New Hampshire is dispatched through a regional power pooling grid system (NEPOOL), the decision below recognized that it would be technically impossible for appellant to end out-of-state transmission of hydroelectric power without elaborate alteration of the regional power transmission lines. Hence, the New Hampshire Supreme Court anticipated that compliance would be achieved by "arrangements" that may naturally flow from the export termination such as "new rates, contract modifications, or accounting adjustments" (J.S. App. 14a). For example, the New Hampshire Supreme Court construed the Public Utilities Commission's order as requiring that all of the economic benefits of the hydroelectric power—which is cheaper than electricity produced from oil-fired generators—must be assigned to New Hampshire consumers, rather than requiring that appellant terminate the transmission of power through the regional power pool (J.S. App. 11a-12a). Simply put, the net effect of the New Hampshire Commission's order is to permit the state to regulate the wholesale price of that portion of the hydroelectric energy sold within New Hampshire.

It is, however, settled at least since *Attleboro* that the states have no authority to set rates or to modify contracts with respect to the interstate transmission and wholesaling of electrical energy in the manner contemplated by the decision below. Part II of the Federal Power Act filled the regulatory gap, and, after declaring that "Federal regulation of [such] matters * * * is necessary in the public interest" (16 U.S.C. 824(a)), granted to the Federal Energy Regulatory Commission "jurisdiction over all facilities for such transmission or sale of electric energy" (16 U.S.C. (& Supp. III) 824

(b)(1)). Thus, in passing Part II of the Federal Power Act in 1935, Congress intended to "touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978); *Hines* v. *Davidowitz*, 312 U.S. 52, 66-67 (1941). The decision below is therefore incompatible with the teaching of *Attleboro* that the states have no constitutional power to regulate interstate transmission and wholesales of electrical energy.

In sum, Section 201(b) does not authorize such state control as would impose the "new rates, contract modifications, or accounting adjustments, [that] may naturally flow from the export termination" (J.S. App. 14a) ordered by the New Hampshire Commission. Since Congress conferred such ratemaking authority on the Federal Energy Regulatory Commission, it could not have intended to allow state regulation in this sphere as well. Indeed, New Hampshire's attempt, through modification of contract rights and rate structures, to gain all of the economic benefits of its hydroelectric power at the expense of its regional neighbors, is contrary to the requirement of Section 205(b) of the Federal Power Act, 16 U.S.C. 824d(b), that the charges and terms of service offered by federally-regulated utilities be free of any "unreasonable difference" "as between localities." Since the New Hampshire order admittedly seeks to achieve lower wholesale rates for New Hampshire companies than those paid by public utilities in the neighboring states, it (no less than a similar ratemaking effort by a neighboring state) must give way under the Supremacy Clause. Section 201(b) does not sanction such state parochialism at the expense of other states. As the Court recently observed in an analogous context in *Maryland* v. *Louisiana*, No. 83 Orig. (May 26, 1981), slip op. 24-25, "[t]he

FERC need not adjust its rulings to accommodate the [state] statute. To the contrary, the State may not trespass on the authority of the federal agency."

5. Finally, the decision below is contrary to Part II of the Federal Power Act insofar as the federal regulation established by Congress was intended to achieve the regional coordination of power resources which the states were unable to accomplish.[12] As one of the draftsman of Part II stated:

> Title II of this bill provides for regional development, the most economic development in this industry, under the supervision of the Federal Power Commission. It proceeds upon the engineering truth that the most effective utilization of our power resources requires positive Federal action designed to develop these resources on a regional rather than on a State basis.

Hearings on H.R. 5423, supra, Pt. 3 at 2168 (remarks of Mr. DeVane, Solicitor of the FPC).

Congress' purpose to coordinate such regional development of energy resources is further evidenced in Section 202 of the Act, 16 U.S.C. 824a. In order to assure "an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources" (16 U.S.C. 824a(a)), Section 202 authorizes and directs the Commission to divide the nation into regional districts in which the facilities for the generation, transmission and sale of electric energy could be coordinated. Congress wanted the Commission to encourage and promote the interconnection and coordination of all electric energy systems throughout the nation. Most recently, Congress has reaffirmed its desire to maximize the regional and national coordination of

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[12] S. Rep. No. 621, 74th Cong., 1st Sess. 17-18 (1935); *Hearings on H.R. 5423, supra*, Pt. 1 at 549, Pt. 3 at 2168.

energy resources by the enactment of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117, which added Sections 210, 211, and 212 to Part II of the Federal Power Act, 16 U.S.C. (Supp. III) 824i, 824j, and 824k.[13] Those provisions establish additional mechanisms for increasing the regional and national sharing of energy facilities and resources.

The goal of regional coordination of energy resources has been largely realized in the New England region, where the electric utilities participate in the most highly integrated, and successful, power pool in the country. The New Hampshire statute and state commission order, however, undermine the regional sharing of resources by allocating all of the economic benefits of New Hampshire-generated hydroelectric power to the citizens of that state. As such, they "stand[] as * * * obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The New Hampshire statute and state commission's order therefore violate the Supremacy Clause.

C. The Order of the New Hampshire Public Utilities Commission Is Contrary to Part I of the Federal Power Act

The decision below construing Section 201(b) of the Federal Power Act as authorizing New Hampshire to regulate the transmission outside the state of hydroelectric power generated within New Hampshire is also incompatible with the exclusive federal regulatory jurisdiction established by Part I of the Federal Power Act.

Appellant's six hydroelectric generating projects are licensed by the Federal Energy Regulatory Commission

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[13] The constitutionality of that act is currently pending before the Court in *FERC and James B. Edwards* v. *Mississippi*, No. 80-1749.

under Part I of the Federal Power Act. These licenses are issued on the condition, *inter alia*, that the project "* * * will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce * * *" (16 U.S.C. 803(a)). Hence, New Hampshire's proscription of the sale of power outside the state is squarely at odds with the federal policy upon which appellant's projects were licensed, viz., that these hydroelectric stations would benefit interstate commerce. To permit New Hampshire to bar the interstate transmission of such power would vest it with a virtual "veto power over the federal project" and "would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal [Energy Regulatory] Commission." *First Iowa Hydro-Electric Coop.* v. *FPC*, *supra*, 328 U.S. at 164.

Contrary to the New Hampshire Supreme Court's suggestion (J.S. App. 5a), the fact that the state commission's order does not require compliance with N.H. Rev. Stat. Ann. § 374:35 (1966 repl.) as a condition precedent to obtaining a federal license under Part I does not save the order. The Court viewed Part I of the Federal Power Act much too narrowly. The Act does not simply authorize the federal authorities to grant licenses; it bespeaks a policy of benefitting interstate commerce and rests the licensing authority on that policy. Because the state commission's order thwarts that policy by attempting to retain all the benefits of the projects within New Hampshire, it cannot stand. As the Court stated in the analogous context of natural gas regulation, "although collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation

ordained by Congress." *Northern Natural Gas Co.* v. *Kansas Commission*, 372 U.S. 84, 92 (1963).[14]

CONCLUSION

The judgment of the Supreme Court of New Hampshire should be reversed.

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[14] Section 201(b) of the Federal Power Act, upon which the decision below relied (J.S. App. 4a-8a), does not undermine our submission that Part I of the Federal Power Act preempts the state commission's order. By its terms, Section 201(b) applies only to Part II of the Federal Power Act. But even if the "lawful authority" of the states over the exportation of hydroelectric energy preserved by Section 201(b) has any application to Part I of the Act, it is plain that the provision simply permits the states to license those projects on nonnavigable streams that do not "affect" interstate commerce. Section 201(b) does not authorize state authority of the type involved in this case over projects that are indisputably located on a navigable waterway such as the Connecticut River. See *Bellows Falls Hydro-Electric Corp.*, 2 F.P.C. 380 (1941).

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